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# A PECULIAR PRIVILEGE IN HISTORICAL PERSPECTIVE: THE RIGHT TO REMAIN SILENT

*Albert W. Alschuler\**

## I. INTRODUCTION: TWO VIEWS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Supreme Court decisions have vacillated between two incompatible readings of the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."<sup>1</sup> The Court sometimes sees this language as affording defendants and suspects a right to remain silent. This interpretation — a view that countless repetitions of the *Miranda* warnings have impressed upon the public — asserts that government officials have no legitimate claim to testimonial evidence tending to incriminate the person who possesses it. Although officials need not encourage a suspect to remain silent, they must remain at least neutral toward her decision not to speak. In the Supreme Court's words, "[T]he privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"<sup>2</sup> He must have a "free choice to admit, to deny, or to refuse to answer."<sup>3</sup> The Fifth Amend-

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Matching the breadth and depth of Jerry Israel's knowledge of criminal procedure fortunately is not a prerequisite to publishing a paper in his honor. Neither is matching his wisdom, his thoroughness, his consistently sensible judgment, or the care, precision, and clarity of his words. As a scholar and educator, Jerry Israel gives brilliantly to the legal profession, and if the *Michigan Law Review* had not permitted less accomplished laborers to write for this issue, the issue would have been thin.

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1. U.S. CONST. amend. V.

2. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

3. *Garner v. United States*, 424 U.S. 648, 657 (1976) (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

ment dictates an "accusatorial system," one requiring "the government in its contest with the individual to shoulder the entire load."<sup>4</sup> On this view, the concept of waiving the privilege seems unproblematic; one might waive a right to remain silent for many plausible reasons.

On the Court's second interpretation, the Self-Incrimination Clause does not protect an accused's ability to remain silent but instead protects him only from improper methods of interrogation.<sup>5</sup> This second interpretation emphasizes the word "compelled," a word that appears upon first reading to express the Self-Incrimination Clause's core concept. In ordinary usage, compulsion does not encompass all forms of persuasion. A person can influence another's choice without compelling it; to do so she need only keep her persuasion within appropriate bounds of civility, fairness, and honesty. Compulsion is an open-ended concept encompassing only improper persuasive techniques.<sup>6</sup> On this

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4. *Murphy v. Waterfront Commn.*, 378 U.S. 52, 55 (1964) (quoting 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2251, at 317 (John T. McNaughton rev. ed. 1961)) (internal quotation marks omitted).

5. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 141-43 (1993).

6. Efforts to define compulsion and related words like coercion, duress, and involuntariness in terms of a subjective sense of constraint are unproductive. See ROBERT L. HALE, *FREEDOM THROUGH LAW* 109-33 (1952). Consider, for example, the hypothetical case of Adam, whose dentist recently sued him to recover fees for two dental procedures.

The case began when Adam awoke one day with a toothache. He went to his dentist who pulled the tooth. Adam later refused to pay the dentist's bill, claiming that his contract with the dentist was involuntary. He said that his terrible toothache had denied him any choice in the matter. A judge rejected Adam's contention, and the dentist recovered her fee.

The dentist, however, did not recover her fee for the second procedure. Immediately after her extraction of the tooth, she told Adam that his teeth needed cleaning. Adam replied that he did not want her to clean his teeth. The dentist then grabbed Adam's arm, pulled it behind his back, and twisted it hard. Adam screamed in pain, reconsidered his position, and asked the dentist to clean his teeth. He once more claimed that his contract with the dentist was involuntary, and this time, the judge agreed with him.

Adam's twisted arm was, however, less painful than his aching tooth. His subjective sense of constraint — his sense that he had "no choice" but to employ the dentist — was stronger in the case he lost than in the case he won. The distinction between these cases rested on the fact that a wrongful human action had induced the second contract but not the first. To speak of an overborne will or of an offer that one cannot refuse usually does not help to resolve the issues in either dental cases or confession cases. A better focus is the propriety or impropriety of human influences on choice. Cf. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment . . . is governmental coercion.").

An action appropriately judged coercive in one setting need not be judged coercive in another. Much depends on the purposes of the choice allegedly coerced, on the extent to which some assertedly coercive persuasive technique has subverted those purposes,

view of the self-incrimination privilege, the concept of waiver of the privilege becomes paradoxical. Although a defendant or suspect might sensibly waive a right to remain silent, few sane adults would waive a right to be free of compulsion.<sup>7</sup>

The two opposing interpretations of privilege advance different interests,<sup>8</sup> but the practical difference between them may not be enormous. Like affording a right to silence, forbidding improper means of interrogation protects against torture, other abusive interrogation techniques, and imprisoning someone for refusing to incriminate herself. The clash between the two interpretations centers mostly on whether a fact finder may appropriately treat the refusal of a suspect or defendant to speak as one indication of her guilt. *Griffin v. California*,<sup>9</sup> in which the Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the

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and on the strength of the affirmative reasons for permitting the challenged technique of persuasion.

George Thomas and Marshall Bilder have noted that standard usage treats the words "compulsion" and "coercion" as essentially interchangeable. The words differ only because compulsion can arise from many sources while coercion is always the product of purposeful human activity: "While one would not say the sun coerced S into wearing a hat, . . . one could quite comfortably say that the sun compelled S to wear a hat." George C. Thomas III & Marshall D. Bilder, *Criminal Law: Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 257 & n.74 (1991). In the context of the Fifth Amendment privilege (which limits the conduct of government officers and not of the sun), the difference between the two concepts seems unimportant.

Stephen Schulhofer once wrote that "compulsion for self-incrimination purposes and involuntariness for due process purposes cannot mean the same thing." Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 443 (1987). Schulhofer also has written, "The . . . view . . . that Fifth Amendment compulsion and due-process coercion are identical . . . would . . . make shreds of the entire fabric of Fifth Amendment doctrine and tradition." Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 551 (1996) [hereinafter Schulhofer, *Miranda's Practical Effect*]. Schulhofer recognized, however, that in ordinary usage "terms like coercion and compulsion have virtually interchangeable meanings." *Id.* His point appeared to be that many Fifth Amendment rulings have departed from the ordinary English-language meaning of the Constitution — a point that scholars who disagree with Schulhofer undoubtedly would rush to embrace. See, e.g., Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 684-85 (1986).

7. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 280-82 (1973) (Marshall, J., dissenting); HENRY J. FRIENDLY, *BENCHMARKS* 271 (1967); GRANO, *supra* note 5, at 142.

8. The "right to silence" interpretation emphasizes safeguarding the privacy of incriminating information, tolerating the impulse of an accused person toward self-preservation, and maintaining an "accusatorial" system. The "improper methods" interpretation simply emphasizes treating suspects and defendants in a humane fashion.

9. 380 U.S. 609 (1965).

court that such silence is evidence of guilt,"<sup>10</sup> focused the choice between the two competing interpretations more sharply than any other Supreme Court decision has.

Justice Douglas's majority opinion in *Griffin* invoked the language of unconstitutional conditions, declaring that comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."<sup>11</sup> Justice Stewart's dissenting opinion replied that "[c]ompulsion is the focus of the inquiry" and that "the Court in this case stretches the concept of compulsion beyond all reasonable bounds."<sup>12</sup>

Although the majority and dissenting justices in *Griffin* divided over which view of the Fifth Amendment privilege to endorse, the Court's opinion in *Miranda v. Arizona*<sup>13</sup> the following year embraced both. The first *Miranda* warning — "You have a right to remain silent" — strongly indicated the Court's approval of the "right to silence" interpretation of the Fifth Amendment. So did the Court's expansive accusatorial rhetoric<sup>14</sup> and its demand for a knowing and intelligent

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10. 380 U.S. at 615.

11. 380 U.S. at 614. The majority's reliance on the doctrine of unconstitutional conditions in *Griffin* was unnecessary. Rather than contend that prosecutorial comment burdens the exercise of a right to remain silent, the majority might have argued that comment on a defendant's silence violates the Fifth Amendment, pure and simple.

When the defendant in *Griffin* refused to testify, the prosecutor invited a jury to infer this defendant's consciousness of guilt and his knowledge of incriminating circumstances. The prosecutor thus converted even a silent defendant into a source of evidence against himself. The defendant might have avoided an unfavorable inference by speaking, but if he had spoken, he would have been obliged to tell the truth. If the defendant were guilty, and possibly even if he were not, the truth would have been incriminating. The defendant in *Griffin* thus might have had no way to avoid incriminating himself; either his truthful speech or his silence would have been treated as evidence of guilt. Because the defendant lacked an alternative, he was compelled to become a witness of sorts against himself. Cf. 380 U.S. at 613-14.

Although this argument for the result in *Griffin* seems stronger than the argument based on the doctrine of unconstitutional conditions, both arguments depart from ordinary concepts of morality, sensible criminal justice policy, and the historic understanding of the Fifth Amendment privilege. The issue will be examined more fully in this article.

12. 380 U.S. at 620 (Stewart, J., dissenting). Justice Stewart also wrote, "[I]f any compulsion be detected in the California procedure, it is of a dramatically different . . . nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee." 380 U.S. at 620 (Stewart, J., dissenting).

13. 384 U.S. 436 (1966).

14. See, e.g., 384 U.S. at 460 (praising accusatorial procedure).

waiver of the privilege as a prerequisite to the admission of any statement made by a suspect at the stationhouse.<sup>15</sup>

The Court, however, did not direct law enforcement officers to provide the *Miranda* warnings whenever they asked a person suspected of a crime to incriminate herself. Only suspects *in custody* were entitled to the warnings,<sup>16</sup> and the Court referred to the “inherently compelling nature” of custodial interrogation. This language and other aspects of the *Miranda* opinion — for example, the Court’s discussion of the stratagems that interrogation manuals encouraged law enforcement officers to use while questioning suspects — suggested that the Court was still concerned with the quality and extent of the pressure brought to bear upon suspects and that the Fifth Amendment might not prohibit every inducement to speak. At the same time, much of the Court’s discussion of stationhouse interrogation indicated that it was compelling only because it undercut the right to remain silent. A reader attempting to infer from *Miranda* whether the Fifth Amendment mandated neutrality toward a suspect’s decision to remain silent could become confused.

No one really knows what *Miranda* means. In recent decades, the Supreme Court has insisted repeatedly that the “prophylactic *Miranda* warnings . . . are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.’ ”<sup>17</sup> The Court thus has appeared to suggest that the *Miranda* warnings are not constitutionally required, but the Court plainly has no authority under the Constitution to reverse state court decisions that comply with federal law.<sup>18</sup> The off-hand asser-

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15. See 384 U.S. at 475 (declaring that “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination”).

16. See 384 U.S. at 444 & n.4. Two years before *Miranda*, *Escobedo v. Illinois*, 378 U.S. 478 (1964), had indicated that warnings might be required when law enforcement officers questioned any person upon whom suspicion had “focused” — in other words, whenever they asked a suspect to incriminate herself. If suspects have a right to remain silent, police interrogation asks them to waive this right whether they are in custody or not, and warnings could help to ensure that their waivers are knowing. The Supreme Court apparently required warnings only for suspects in custody because it concluded that only suspects in custody were subject to compulsion. The Court’s analysis therefore adhered at least nominally to the proposition that the privilege simply guards against compulsion; it does not guarantee every suspect, in custody or not, a right to remain silent.

17. *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); see also; *Davis v. United States*, 114 S. Ct. 2350, 2354 (1994); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Moran v. Burbine*, 475 U.S. 412, 424 (1986); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“[The *Miranda* exclusionary rule] may be triggered even in the absence of a Fifth Amendment violation.”).

18. See U.S. CONST. art. III, § 2.

tion of a supervisory power over the administration of state criminal justice would have been startling, and one hesitates to attribute this assertion to the Supreme Court.<sup>19</sup> The claim that the *Miranda* warnings were constitutionally required for prophylactic reasons, however, would have been less disturbing. As David Strauss has noted, the Supreme Court often has articulated prophylactic rules to increase the probability that America's constitutional law in action will correspond to its constitutional law on parchment.<sup>20</sup> Perhaps *Miranda* excludes uncompelled confessions in some cases to prevent compulsion in other cases,<sup>21</sup> and perhaps the *Miranda* warnings advise suspects misleadingly that they have a right to remain silent in order to protect the different right that the Constitution guarantees them, the right to be free of compulsion.<sup>22</sup>

The *Miranda* opinion gave at least lip service to the literal "compulsion" interpretation of the Fifth Amendment. Post-*Miranda* decisions, moreover, have permitted prison officials to treat a suspect's silence as an indication of his guilt in prison disciplinary proceedings<sup>23</sup> and have allowed prosecutors to impeach the testimony of defendants at trial by showing their earlier failures to speak.<sup>24</sup> Even after *Griffin* and

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19. The *Miranda* Court did indicate that the Constitution's requirement of pre-interrogation warnings is changeable and contingent: "[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed." 384 U.S. at 467.

20. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). But see Joseph A. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (arguing that judges generally lack the authority to articulate prophylactic rules in constitutional litigation).

21. Stephen Schulhofer has endorsed an alternative view of *Miranda* that seems more consistent with the opinion's language but that rests on a seemingly strained and extravagant proposition. In his view, *Miranda* held that in the absence of warnings any answer by a suspect in custody to a police question such as "Would you like to say anything?" or "Did you do it?" is in fact compelled. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 447 (1987) ("The Court held that the briefest period of interrogation necessarily will involve compulsion.")

22. How *Miranda* warnings guard against abusive interrogation techniques, however, is unclear. See *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers."). The *Miranda* opinion repeatedly voiced the assumption that its holding would bring defense attorneys into police interrogation rooms in substantial numbers. The Court claimed that lawyers could guard against police abuse or at least report it. See 384 U.S. at 470. The police, however, comply fully with *Miranda* by ceasing all interrogation when a suspect requests counsel. See 384 U.S. at 474. Even in 1966, it should have been evident that a police officer would not ordinarily go to the trouble of arranging counsel for a suspect so that this lawyer could advise the suspect not to say anything.

23. See *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976).

24. See *Fletcher v. Weir*, 455 U.S. 603 (1982) (postarrest silence); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (pre-arrest silence). But see *Doyle v. Ohio*, 426 U.S.

*Miranda*, the privilege against self-incrimination does not entirely ensure suspects that they will not suffer adverse consequences for refusing to speak. The tension between the two interpretations of the Fifth Amendment privilege remains unresolved.

This article argues that as embodied in the United States Constitution, the privilege against self-incrimination was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions. Its purpose was to outlaw torture and other improper methods of interrogation.

Part II of the article reviews some familiar moral objections to affording suspects and defendants a broad right to silence and emphasizes the extent to which our current criminal justice system departs in practice from its professed accusatorial principles. Part III turns to history, tracing the path of the privilege from its possible origin 1500 years ago as a limitation on the scope of the religious obligation to confess through the decision in *Miranda* and beyond.

Part III divides this history into three stages. It contends that the privilege enforced by seventeenth century common law courts against the English High Commission differed from the privilege that the framers included in the American Bill of Rights in 1791, and that neither the English nor the American version of the privilege afforded suspects and defendants a right to refuse to respond to incriminating questions. The right to remain silent emerged substantially after the framing of the Bill of Rights. Until the nineteenth century was well underway, magistrates and judges in both England and America expected and encouraged suspects and defendants to speak during pretrial interrogation and again at trial. Fact finders did not hesitate to draw inferences of guilt when defendants remained silent. The informal inducements of prenineteenth century trial procedure were, moreover, great enough that virtually every defendant did speak.

At the same time, legal treatises and other sources in use at the time of the framing of the Bill of Rights declared incriminating questioning under oath an improper method of interrogation. They said that placing a suspect on oath was incompatible with his privilege, and they frequently analogized questioning under oath to torture.<sup>25</sup> In accordance with the sentiments voiced by these authorities, courts in England and

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610 (1976) (maintaining that a suspect's silence following *Miranda* warnings may not be used to impeach him because the warnings themselves might have caused him to remain silent).

25. See *infra* text accompanying notes 84-129.



America neither required nor permitted defendants to answer questions under oath.<sup>26</sup>

The coercive power of an oath stemmed partly from its mystic and religious significance, a significance that modern observers may not fully appreciate. Even when judged solely in secular terms, however, oaths undoubtedly seemed coercive to the framers. Once a witness was placed on oath, her refusal to answer constituted contempt and was subject to criminal punishment. Her false answers constituted perjury. The witness could avoid punishment only by telling the truth, and when the truth was incriminating, she was therefore threatened with criminal punishment unless she condemned herself. That lawyers of the seventeenth and eighteenth centuries regarded the threat of this punishment as compulsion should not be at all surprising.

A failure adequately to appreciate the distinction between sworn and unsworn statements led to slippage from the historic meaning of the privilege. Unlike an unsworn defendant, a witness who had been sworn and who was asked incriminating questions could refuse to respond. This sworn witness had a limited right to remain silent. If the witness chose to reveal incriminating information, moreover, she could fairly be said to have waived her privilege against self-incrimination. The objection to interrogating this witness rested on the compulsion effected by an improper technique of interrogation, however, and did not extend to all methods of encouraging suspects and defendants to speak.

Language that appropriately described the situation of sworn witnesses ultimately was extended to unsworn suspects, and the silence of these suspects came to be seen as a moral right. Where the Framers of the Constitution saw an obligation to the community to speak, later judges and scholars saw a right to refuse to cooperate in what they regarded as a poetic, inspiring contest between the individual and the state.

The coercive power of the oath explains why prosecution witnesses and civil litigants, who were sworn, invoked the privilege more frequently and more successfully than criminal defendants, who were not. It also explains why two groups of historians — those who have examined the rights of sworn witnesses and those who have examined the rights of criminal defendants — have asserted strikingly different dates for the origin of the privilege.

Part IV of the article examines the relevance of this history to current constitutional issues.

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26. See *infra* text accompanying notes 60-62, 77 & 137-50.

## II. THE PUZZLING ETHICS OF THE RIGHT TO SILENCE

In a classic article, *Silence as a Moral and Constitutional Right*, R. Kent Greenawalt discussed the ordinary morality of interrogating a person suspected of wrongdoing.<sup>27</sup> Greenawalt drew a contrast between questioning on slender suspicion and questioning on solidly grounded suspicion, and he offered a number of illustrations of the moral difference between these two practices.

When Ann has little basis for suspecting that Betty has stolen her property, Greenawalt suggested that it would be insulting and unfair for Ann to ask Betty to account for her activities at the time of the theft. Betty might properly respond, "That's none of your business." If, however, a friend had told Ann that he had seen Betty wearing a distinctive bracelet like the one that Ann had reported stolen, then Ann might appropriately describe the reason for her suspicion and ask Betty to explain. Ann's query would be less insulting and intrusive than most other means of confirming or dispelling her suspicion — surreptitiously watching Betty, searching her possessions, or interrogating her associates. In such circumstances, Betty would have powerful reasons for responding, and if she declined, Ann's suspicion could appropriately increase.<sup>28</sup>

Although Greenawalt analyzed close personal relationships and less personal relationships separately, he concluded that the line between slight suspicion and well-grounded suspicion marked the boundary between proper and improper questioning in both. In Greenawalt's view of ordinary morality, a person interrogated on slender suspicion may appropriately remain silent; a person questioned on well-grounded suspicion may not.<sup>29</sup>

If the United States Constitution had adhered to Greenawalt's view of morality, the Fifth Amendment might have provided a limited right to silence comparable to the limited freedom from governmental searches and seizures afforded by the Fourth Amendment.<sup>30</sup> The Fourth

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27. See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

28. See *id.* at 20-26.

29. See *id.* at 26-32.

30. A common response to Greenawalt's argument is that private interrogation cannot be analogized to governmental interrogation because interrogation leading to a criminal conviction has substantially more severe consequences than questioning leading to a private sanction. See, e.g., Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNATL. L. 1121, 1140 (1995). Some private sanctions, however (for example, a discharge from employment), are more severe than some criminal sanctions (for example, unsupervised probation). More importantly, if someone is guilty of a crime, it seems as appropriate for the

Amendment provides only a qualified immunity from governmental intrusion — one that can be overcome by a showing of probable cause. The privilege afforded by the Fifth Amendment, however, is unqualified. The Framers of the Constitution apparently concluded that no amount of evidence could justify compelling a person to supply testimonial evidence against herself in a criminal case. The Fourth Amendment, which forbids only unreasonable searches and seizures, invites balancing. The Fifth Amendment does not. The Constitution says flatly that no person shall be compelled in any criminal case to be a witness against himself.<sup>31</sup>

Like a police search, governmental interrogation invades a suspect's privacy and should not be permitted without antecedent justification. A limited right to silence — one that could be overcome by a showing of probable cause — could easily be justified. As many writers have observed, however, the rationales that the Supreme Court has offered for a more sweeping right to silence are unconvincing,<sup>32</sup> and the

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government to punish her as for her employer to discharge her. Greenawalt's critics have not explained why a difference in the severity of the threatened sanction should cause a turnabout in the principles of justice that he articulated; these critics presumably do not contend that one should be privileged to frustrate deserved governmental punishment but not deserved private punishment. Although the position of these critics reflects the almost intuitive liberal sense that the public and private realms are "just different," their argument seems seriously incomplete.

31. *But see* California v. Byers, 402 U.S. 424, 427 (1971) (opinion of Burger, C.J., joined by Stewart, White & Blackmun, JJ.) (endorsing balancing).

32. For example, the Supreme Court once maintained that the privilege against self-incrimination expresses "our respect for the inviolability of the human personality and . . . the right of each individual 'to a private enclave where he may lead a private life.' " *Murphy v. Waterfront Commn.*, 378 U.S. 52, 55 (1964) (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956)). The Court has since recognized that the privilege protects privacy only haphazardly. *See Fisher v. United States*, 425 U.S. 391, 400-01 (1976). Even the most expansive view of the privilege would not protect the privacy of an intimate diary that contained no matter tending to incriminate its owner. If, however, the act of producing a grocery list or other impersonal document would tend to incriminate the person ordered to produce it, she need not respond. Moreover, a grant of immunity lifts the protection of the privilege altogether; with it, a person can be forced to tell all. The privilege does not protect this person's privacy; it protects her only from being forced to incriminate herself.

For convincing responses to most of the justifications that the Supreme Court has asserted for the privilege, see LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* (1959); WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 59-76 (1967); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 889-95 (1995); Donald A. Dripps, *Against Police Interrogation — And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988); Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Charles T. McCormick, *Some Problems and Developments in the Admissibility*

more elaborate rationales offered by academic writers are similarly unpersuasive.<sup>33</sup> Accepting the common assumption that the privilege affords a right to silence, Stephen Schulhofer recently wrote, "It is hard to find anyone these days who is willing to justify and defend the privilege against self-incrimination."<sup>34</sup> Akhil Amar and Renée Lettow added, "Small wonder . . . that the Self-Incrimination Clause — virtually alone among the provisions of the Bill of Rights — has been the target of repeated analytic assault over the course of the twentieth century from thoughtful commentators urging constitutional amendments to narrow it or repeal it altogether."<sup>35</sup>

Although the Supreme Court has said that the privilege is the "essential mainstay" of an accusatorial system<sup>36</sup> and that it "requir[es] the government in its contest with the individual to shoulder the entire load,"<sup>37</sup> our legal system is substantially less accusatorial than this rhetoric suggests. The Supreme Court has required defendants to shoulder much of the load by producing incriminating documents,<sup>38</sup> giving pre-trial notice of defenses and of the evidence to be used to support

of Confessions, 24 TEXAS L. REV. 239, 277 (1946); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1891).

33. For sophisticated defenses of the privilege, see Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970); Robert S. Gerstein, *Punishment and Self-Incrimination*, 16 AM. J. JURIS. 84 (1971); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988). For responses, see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1122-37 (1986); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 320-21, 322-23 (1991).

34. Schulhofer, *supra* note 33, at 311. For Schulhofer's justification and defense of the privilege — that it protects innocent defendants who might be unconvincing on the witness stand — see *id.* at 327-33. *But see* Allen v. Illinois, 478 U.S. 364, 375 (1986) ("The privilege against self-incrimination . . . is not designed to enhance the reliability of the factfinding determination . . ."); *Tehan v. Shott*, 382 U.S. 406, 415-16 (1966) (refusing to apply *Griffin v. California* retroactively because "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction" and because "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth"); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1631 (1996) (holding that although the privilege may benefit some innocent defendants, "[o]ne could say the same thing for a rule that bars the testimony of prosecution witnesses whose last names begin with the letter R").

35. Amar & Lettow, *supra* note 32, at 895.

36. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Tehan*, 382 U.S. at 414; *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

37. *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (citation omitted).

38. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

them,<sup>39</sup> providing copies of defense investigative reports,<sup>40</sup> and supplying all forms of nontestimonial evidence — blood samples,<sup>41</sup> voice samples,<sup>42</sup> and even, in one case, the body of a child whom a suspect was thought to have killed.<sup>43</sup>

The virtues of an “accusatorial” system in which defendants are privileged to remain passive are far from obvious. The person who knows the most about the guilt or innocence of a criminal defendant is ordinarily the defendant herself. Unless expecting her to respond to inquiry is immoral or inhuman — contrary to Greenawalt’s view of ordinary morality — renouncing all claim to her evidence is costly and foolish.<sup>44</sup>

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39. See *Williams v. Florida*, 399 U.S. 78 (1970).

40. See *United States v. Nobles*, 422 U.S. 225 (1975).

41. See *Schmerber v. California*, 384 U.S. 757 (1966).

42. See *United States v. Dionisio*, 410 U.S. 1 (1973).

43. See *Baltimore Dept. of Social Servs. v. Bouknight*, 493 U.S. 549 (1990). Although the Court viewed the body of the suspected homicide victim as nontestimonial evidence, it recognized that the act of producing the body might supply testimonial evidence that the Fifth Amendment would permit a suspect to withhold. In *Bouknight* itself, however, the Court declared the privilege unavailable because a court had adjudicated the suspected homicide victim a child in need of assistance. His mother, the woman suspected of killing him, therefore held him only as a representative of the state. More than five years after the Supreme Court decision and more than seven years after Jacqueline Bouknight was imprisoned for failing to produce the body of her son Maurice, she was released from a Baltimore jail. See *Mother Ends 7-Year Jail Stay, Still Silent About Missing Child*, N.Y. TIMES, Nov. 2, 1995, at A18. In our accusatorial system, she had served more time for failing to produce evidence of the suspected but unproven killing than she would have served if she had been convicted of manslaughter.

44. When one considers the issue as a matter of abstraction, the gain in human dignity afforded by a right to silence may seem to justify the substantial burdens upon law enforcement that the right imposes. The balance, however, may appear more problematic when one focuses on a specific case. For example, shortly before midnight on May 26, 1996, a driver in Will County, Illinois, killed three teenage pedestrians, then left the scene of the accident. Effective police work located the 1987 Chevy Blazer involved in the accident, but its owner refused to speak to authorities about whether he or someone else had been driving the vehicle. See Jerry Shnay, *More Charges Are Expected in Fatal Hit-And-Run*, CHI. TRIB., June 7, 1996, at 1. One could imagine a case in which this refusal would make it impossible to establish beyond a reasonable doubt the owner’s guilt of any crime. In this situation, the owner’s refusal to answer might seem more a triumph of incivility than a triumph of human dignity. One wonders whether the Constitution truly affords a suspect the right to thumb his nose at an aggrieved community in this fashion and, if it does, how the Framers could have viewed this right as noble and inspiring.

Similarly, one wonders whether it would have been cruel or unfair to ask O.J. Simpson to explain the strong proof of guilt that prosecutors presented at his trial and to draw an inference adverse to Simpson if he declined. Simpson’s lawyers evidently concluded that he would increase his chances of acquittal by not discussing before the jury why telephone company records indicated that he was making calls from his Bronco at a time when he claimed to have been at home, why he told the limousine driver who saw him enter his darkened doorway that he had been asleep, whether Nicole Simpson

Our legal system is in fact wise enough to reject in practice much of the accusatorial rhetoric it proclaims in theory. It actively seeks incriminating, testimonial evidence from the people it accuses of crime. Unfortunately, it often does so in troublesome ways. Every year, courts find that suspects in the back rooms of police stations have made multitudes of knowing and intelligent waivers of their Fifth Amendment rights. If these suspects had understood their situations in the slightest degree, most of them would have remained silent.<sup>45</sup> In addition, 92 percent of all felony convictions in the United States are by guilty plea.<sup>46</sup> Behind this figure lies the practice of plea bargaining. Prosecutors and other officials exert extraordinary pressure on defendants, not merely to obtain an answer, but to secure an unqualified admission of guilt. The Federal Sentencing Guidelines currently promise a substantially discounted sentence to a defendant who supplies "complete information to the government concerning his own involvement in the offense."<sup>47</sup> Few other nations are as dependent as ours on proving guilt from a defendant's own mouth.

No parent or schoolteacher feels guilty about asking questions of a child strongly suspected of misconduct. Similarly, no employer considers it improper to ask an employee accused of wrongdoing to give his side of the story. Criminal cases aside, there are apparently no investigative or fact-finding proceedings in which asking questions and expecting answers is regarded as dirty business. Noting that "parents try hard to inculcate in their children the simple virtues of truth and responsibility," Justice Walter V. Schaefer once wrote that "the Fifth Amendment privilege against self-incrimination . . . runs counter to our ordinary standards of morality."<sup>48</sup>

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had ever given him a pair of Aris Isotoner gloves, where he had been planning to go at the time of the chase that everyone watched on television, how his blood could have been found on his driveway before any blood sample had been obtained from him, and other troublesome, unresolved questions.

The lawyers' judgment might well have been correct; Simpson probably improved his chances of acquittal by remaining silent. Encouraging jurors to use their common sense rather than the "artificial reason" of the law to assess the sounds of Simpson's silence could conceivably have altered the outcome of the trial.

45. For descriptions of the intimidating techniques used by police officers to obtain confessions in the post-Miranda era, see DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 199-220 (1991); Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 *LAW & SOC. REV.* 259(1996).

46. See BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* — 1994, at 486, tbl. 5.49 (1995) (NCJ-154591).

47. U.S. SENTENCING COMM., *FEDERAL SENTENCING GUIDELINES MANUAL* § 3.E1.1(b)(1) (1995).

48. SCHAEFER, *supra* note 32, at 59; see also Charles T. McCormick, *Law and the Future: Evidence*, 51 *NW. U. L. REV.* 218, 222 (1956) ("Ordinary morality . . . sees

People who regard criminal defendants as an appropriate source of evidence for resolving criminal disputes may wonder how the contrary position became, at least sometimes, a revered principle of American constitutional law.<sup>49</sup> The common assumption that the privilege mandates an accusatorial system and forbids all efforts to induce a defendant to reveal what she knows explains much of the persistent criticism of the privilege. This criticism and much other discussion of the privilege, however, have rested on a historical misconception. The privilege in its inception was not intended to afford criminal defendants a right to refuse to respond to incriminating questions. Its purposes were far more limited.

### III. A HISTORY OF THE PRIVILEGE IN THREE ACTS

The history of the modern privilege against self-incrimination can be divided roughly into three stages, each of them captured by its own distinctive formulation of the doctrine. At the earliest stage, the privilege against self-incrimination was expressed in maxims like *Nemo tenetur seipsum accusare* ("No one shall be required to accuse himself") and *Nemo tenetur prodere seipsum* ("No one shall be required to produce himself" or "No one shall be required to betray himself"). At the second stage, the formulation was that of the United States Constitution: No person "shall be compelled in any criminal case to be a witness against himself." At the third stage (the modern stage), the warnings mandated by *Miranda v. Arizona* express the general although not universal understanding of the privilege: "You have a right to remain silent." These formulations often are treated as equivalent, but they are very different.

#### A. *Nemo Tenetur Prodere Seipsum*

As Richard Helmholz has demonstrated, the roots of the privilege in the early seventeenth century are to be found, not in the common law of England, but in the *ius commune* — the law applied throughout the European continent and in the English prerogative and ecclesiastical courts.<sup>50</sup> When seventeenth century common law courts restricted the power of the High Commission to ask incriminating questions of sus-

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nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged . . . I predict that the weaknesses of the privilege in point of policy and morality will become more widely understood.").

49. Champions of the right to remain silent may wonder about it too.

50. See R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990).

pected religious dissenters, these courts were, for the most part, requiring the Commission to adhere to law that it purported to observe.

Several maxims of the *ius commune* expressed its most important limitation on interrogation. In addition to the familiar *nemo tenetur* maxim given above, the *ius commune* made use of two more: *Nemo punitur sine accusatore* ("No one is punished in the absence of an accuser") and *Nemo tenetur detegere turpitudinem suam* ("No one is bound to reveal his own shame").<sup>51</sup>

The principle reflected in these maxims was unknown in classical Roman law,<sup>52</sup> and when it entered the *ius commune* is uncertain. A plausible hypothesis is that the privilege began as a limitation upon the religious duty to confess.<sup>53</sup> By the third century, penance for wrongdoing was an obligation of Christian faith,<sup>54</sup> and the penance occurred in public. Whether this penance generally included a public confession, or whether, instead, private confession preceded public penance is a matter of dispute,<sup>55</sup> but the Church ultimately demanded only private (auricu-

51. *Id.* at 975, 981.

52. See MAX RADIN, HANDBOOK OF ROMAN LAW 468 (1927). Early Jewish law, however, forbade nearly all self-incriminating testimony and excluded nearly all self-incriminating out-of-court statements. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 433-41 (2d ed. 1986); Irene Merker Rosenberg & Yale L. Rosenberg, *The Talmidic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

53. See Amar & Lettow, *supra* note 32, at 896.

54. Earlier, the church may not have recognized any sacrament for the remission of sins other than baptism. See M. Joseph Costelloe, *Penitential Controversy*, in 3 ENCYCLOPEDIA OF RELIGION 2721, 2722 (Paul Kevin Meagher et al. eds., 1979); L. Michael White, *Penance*, in ENCYCLOPEDIA OF EARLY CHRISTIANITY 708 (Everett Ferguson ed., 1990).

55. Compare R.S.T. HASLEHURST, SOME ACCOUNT OF THE PENITENTIAL DISCIPLINE OF THE EARLY CHURCH IN THE FIRST FOUR CENTURIES 100 (1921) (reciting substantial circumstantial evidence that confession in the early Church was public) and J.N.D. KELLY, EARLY CHRISTIAN DOCTRINES 216 (5th ed. 1977) (noting that in the third century penitential discipline "was wholly public, involving confession, a period of penance and exclusion from communion, and formal absolution and restoration") and 1 HENRY CHARLES LEA, A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH 217 (1968) (1896) ("[D]uring the early centuries the only confession recognized by the Church was . . . made by the sinner in the congregation of the faithful, unless, indeed, he might be on trial before his bishop and then it was public in the episcopal court . . .") and Eugene LaVerdiere, *Confession of Sin*, in ENCYCLOPEDIA OF EARLY CHRISTIANITY, *supra* note 54, at 223, 224 ("By the fifth century, the practice of public confession had been replaced by private confession . . .") with JOSEPH A. FAVAZZA, THE ORDER OF PENITENTS: HISTORICAL ROOTS AND PASTORAL FUTURE 214-17 (1988) (noting that in the third century private confession to a priest was followed by public confession that was liturgical rather than informative) and John Halliburton, 'A Godly Discipline': *Penance in the Early Church*, in CONFESSION AND ABSOLUTION 40, 45 (Martin Dudley & Geoffrey Rowell eds., 1990) ("Those who write of 'public confession' in the early Church normally fail



lar) confession. The fourth century Church leader St. John Chrysostom wrote, "I do not say that you should betray yourself in public nor accuse yourself before others, but that you obey the prophet when he said, Reveal your ways unto the Lord."<sup>56</sup> Chrysostom's statement was cited centuries later as a justification for the *nemo tenetur* principle.<sup>57</sup> The fifth century historian Sozomen explained:

[I]n seeking pardon it is necessary to confess the sin; and since from the beginning the bishops decided, as is only right, that it was too much of a burden to announce one's sins as in a theater with the congregation of the Church as witness, they appointed for this purpose a presbyter, a man of the best refinement, a man silent and prudent. To him sinners came and confessed their deeds . . . .<sup>58</sup>

Far from reflecting the notion that wrongdoers have a right to remain silent, the privilege against self-incrimination originally may have reflected only a pragmatic judgment that a sinner's duty did not include a public disclosure that might lead to criminal proceedings. To demand either public disclosure or submission to criminal punishment would have diminished the willingness of wrongdoers to confess, and confession, not silence, was good for the soul.

By the seventeenth century, the privilege had grown into a right not to be interrogated under oath in the absence of well-grounded suspicion. All of the formulations of the *nemo tenetur* principle in the *ius commune* were consistent with the concepts of ordinary morality voiced by Kent Greenawalt. They concerned the initiation of criminal proceed-

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to distinguish between the terms '*exhomologesis*' and '*confessio*.' ") and *Confession, Auricular*, in 1 ENCYCLOPEDIA OF RELIGION, *supra* note 54, at 868 ("More recent historians of penance are in general agreement that public confession was never obligatory in the early Church, although penitents may well have confessed publicly the major sins for which they were doing penance.") and *Rights and Ceremonies*, in 26 THE NEW ENCYCLOPEDIA BRITANNICA 790 (15th ed. 1993) (noting that in the third century, when penitential exercises included fasting, wearing sackcloth, lying in ashes, and other forms of mortification, "[d]etails of the sins committed were confessed in secret to a priest, who then pronounced absolution and imposed an appropriate penance").

56. Helmholtz, *supra* note 50, at 982 (internal quotation marks omitted).

57. See *id.* Chrysostom also wrote, "[I]f a man hasten to confess his crimes and show the ulcer to a doctor, who will heal and not reproach, and receive the medicines from him, and speak with him alone, no one else knowing of it, and carefully tell him all, he shall easily be quit of his sin." HASLEHURST, *supra* note 55, at 101 (internal quotation marks omitted).

58. *Confession, Auricular*, in 1 ENCYCLOPEDIA OF RELIGION, *supra* note 54, at 868 (internal quotation marks omitted). Cyril of Jerusalem wrote, "[T]he Master . . . saith, 'I do not compel thee to come into the midst of the theatre, in the presence of many witnesses: tell the sin to Me, alone, and in private, that I may heal the sore.'" HASLEHURST, *supra* note 55, at 102 (collecting similar sources at 100-05) (internal quotation marks omitted).

ings, declaring that a person could not be required to "accuse" or "produce" or "betray" himself.<sup>59</sup> No person could be required to "reveal" his own wrongdoing. There must instead be an "accuser," someone other than the defendant who had revealed or asserted the defendant's crime. Officials must not commence prosecutions by interrogating at large, by conducting fishing expeditions, or by questioning on what Greenawalt would call slender suspicion. Officials in the seventeenth century and earlier were expected to have probable cause before asking suspects to respond under oath to incriminating questions.

Unlike the common law courts of the seventeenth century, which did not permit criminal defendants and other litigants to testify under oath, the High Commission required parties to swear to answer truthfully all questions that the court might put to them. The High Commission often did so, moreover, without specification of the charges against a suspect or notification of the questions to be asked.<sup>60</sup> When litigants challenged the High Commission's power to administer the *ex officio* oath, they did so primarily on the ground that the *ius commune* did not permit judges to commence *ex officio* procedures. Unless someone with an interest in securing the defendant's conviction had accused her or other strong evidence of her guilt appeared, interrogation of the defendant under oath was improper.<sup>61</sup>

The difference between the procedures of the High Commission and other ecclesiastical courts, in all of which defendants were sworn to tell the truth, and those of common law courts, in which defendants often spoke but were disqualified from testifying under oath, is important in understanding the history of the privilege against self-incrimination. The history of the privilege, from the struggles over the authority of the High Commission through at least the framing of the

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59. Wigmore wrote, "The whole rule was embodied in the maxim, '*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*'" He translated this sentence as, "Though no one is bound to become his own accuser, yet when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself." Wigmore concluded, "*Prodere* was used in the sense of 'to disclose for the first time,' 'to reveal what was before unknown.' The whole maxim, far from establishing a privilege of refusing to answer, expressly declares that answers must be given under certain conditions . . . ." Wigmore, *supra* note 32, at 83-84. For two relatively minor corrections of Wigmore's translation, see Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1367 (1959). See also LEVY, *supra* note 52, at 95-96; 8 WIGMORE, *supra* note 4, § 2250, at 267 n.1, 275-76.

60. See Charles M. Gray, *Prohibitions and the Privilege Against Self-Incrimination*, in TUDOR RULE AND REVOLUTION 345, 355 (Delloyd J. Guth & John W. McKenna eds., 1982).

61. See Helmholz, *supra* note 50, at 975-76.

American Bill of Rights, is almost entirely a story of when and for what purposes people would be required to speak under oath.<sup>62</sup>

In preliterate societies and, to a lesser extent, in societies in which a substantial portion of the population remains illiterate, oaths are the primary means of solemnizing and memorializing important statements and transactions. In these societies, oaths are sometimes accompanied by the sacrifice and dismemberment of animals to make the oaths vivid and also to symbolize the fate awaiting people who default on sworn obligations.<sup>63</sup> God's third commandment to the Israelites was, "Thou shalt not take the name of the Lord thy God in vain."<sup>64</sup>

The Book of Matthew includes Christ's condemnation of oaths,<sup>65</sup> but the leaders of the early Christian Church, prompted in part by social need, concluded that Christ's statement was not meant literally. These leaders pointed to oaths taken by Abraham,<sup>66</sup> St. Paul,<sup>67</sup> and even God<sup>68</sup> in support of their position. Some later Christians, however, including some of the seventeenth century religious dissenters who resisted the *ex officio* oath, took Christ at his word. They conscientiously opposed all oaths.

Oaths were "the institutional glue par excellence" of the medieval Church, and a sixteenth century treatise listed 174 ways in which they

62. As late as 1886 in fact, the Supreme Court wrote:

[A]ny compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

Boyd v. United States, 116 U.S. 616, 631-32 (1886).

63. See *Doctrines and Religious Dogmas*, in 17 THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 55, at 422. Fifteen centuries before Christ, a cuneiform tablet depicted Mithra, the most important god of pre-Zoroastrian Iran, as the god of oaths. See *Mithraism*, in 8 *id.* at 197. See generally Silving, *supra* note 59. The Book of Genesis reported two promissory oaths taken by placing a hand upon the promisee's genitals. See *Genesis* 24:2-9; *Genesis* 47:29-31.

64. *Exodus* 20:7 (King James); see also *Deuteronomy* 5:11; *Leviticus* 19:12.

65. In the Sermon on the Mount, Christ said:

Again, you have heard that it was said to the people long ago, "Do not break your oath, but keep the oaths you have made to the Lord." But I tell you, Do not swear at all: either by Heaven, for it is God's throne; or by the earth, for it is his footstool; or by Jerusalem, for it is the city of the Great King. And do not swear by your head, for you cannot make even one hair white or black. Simply let your "Yes" be "Yes," and your "No," "No"; anything beyond this comes from the evil one.

*Matthew* 5:33-37 (New Am. Bible, rev. ed.).

66. See *Genesis* 21:23-24.

67. See 2 *Corinthians* 1:23.

68. See *Isaiah* 62:8.

had special significance in the *ius commune*.<sup>69</sup> Their mystic power was great enough that in church courts, and even at an early stage in the King's courts, they sometimes were treated as conclusive proof. A defendant could swear his innocence and produce the number of *compurgatores* or "oath-helpers" that the court required. Once the *compurgatores* swore that they believed the defendant's oath, he was, without more, acquitted.<sup>70</sup> By the seventeenth century, however, far from treating a criminal defendant's oath as conclusive, common law courts neither required nor permitted criminal defendants to swear to the truth of their statements. In assessing the coercive power of an oath in that century, one must recall the spirit of the age. It was still a time when questions about whether bread and wine became Christ's body and blood or instead merely symbolized them were matters over which men willingly fought and died.<sup>71</sup>

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69. The quoted phrase, and some of what follows, are taken from R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* (forthcoming 1996), making use of PAOLO PRODI, *IL SACRAMENTO DEL POTERE: IL GIURAMENTO POLITICO NELLA STORIA COSTITUZIONALE DELL'OCCIDENTE* (1992).

70. Compurgation as a mode of trial in common law criminal cases did not survive the Assize of Clarendon in 1166. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 578 (3d ed. 1990). It persisted, however, as a mode of trial in some civil cases until 1602. See *id.* at 389-94.

71. William J. Stuntz's recent account of the history of the privilege attaches less significance to oaths than this article does. Although Stuntz recognizes that "people [in the seventeenth century] took oaths and swearing a good deal more seriously than they might today," he commented that: "[I]t is hard to believe that the sustained criticism of the oath *ex officio* rested primarily on the cruelty of the choice it posed; after all, this was an era when real racks, not metaphorical ones, were employed with some regularity." William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 412-13 (1995).

Stuntz probably overestimated the brutality of English criminal procedure, however; in England, the rack was never employed with regularity. On occasion, the English Privy Council ordered torture for reasons of state, but its goal usually was to gain information and intelligence about an ongoing conspiracy rather than to gain a confession for judicial use. Torture, a recognized part of Continental criminal procedure, simply had no place in the English common law. Moreover, the last case of officially sanctioned torture in England occurred in 1640, and the use of torture had been very infrequent in the preceding decades. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 73-123 (1977).

Stuntz's account of the privilege distinguished between cases of religious persecution and "ordinary" criminal cases. This distinction was indeed significant, and the reverence accorded the privilege today is undoubtedly attributable in part to the fact that its initial champions were courageous defenders of the right to religious freedom rather than murderers, rapists, and highwaymen.

Stuntz's version of the tale, however, seems flawed. As he told it, the privilege, theoretically available to defendants in both heresy and "ordinary" criminal cases, was meaningless in the ordinary cases. Most of these cases were effectively resolved by pretrial questioning, and "the privilege was a trial right. It did not affect pretrial questioning, which was not conducted under oath." Stuntz, *supra*, at 416. Stuntz may have been

To the charge that use of the *ex officio* oath was unlawful without an accuser, defenders of the High Commission responded that *fama publica* (public fame) could take the place of an accuser. Some authorities disputed this proposition, and the sources that recognized a *fama publica* exception to the requirement of an accuser emphasized that rumor alone was not enough:

The fame had to have been the true source of the prosecution; it must not have had its origins simply in malicious rumor-mongering by the enemies of the accused. Moreover, before proceedings could begin, the existence of public fame had to be proved by the testimony of trustworthy persons. It could not simply be assumed to exist. Finally, the public fame had to be so vehement that scandal would be generated by failure to take action upon it.<sup>72</sup>

Under the *ius commune*, the propriety of inquisition before the High Commission thus turned upon the proper application of the principles of morality that Kent Greenawalt articulated more than 300 years later.<sup>73</sup> Disputants considered what sort of antecedent justification the law required before the High Commission could administer the *ex officio* oath and ask questions. Once an appropriate preliminary showing had been made, suspects were required to submit to the oath and to answer.<sup>74</sup>

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unaware that the questioning of common law defendants at trial also was not under oath; the privilege was as unavailable to defendants at trial as it was during their pretrial interrogation.

Stuntz's account failed to consider the fact that heresy and "ordinary" cases were tried in different courts using different procedures; this fact, more than any other, accounted for their different histories. Contrary to Stuntz's hypothesis, the use of oaths in religious courts initially prompted common law enforcement of the privilege. The concern voiced about the coercive character of these oaths was not merely a cover.

72. Helmholz, *supra* note 50, at 977-78 (citation omitted).

73. Although the defenders of the High Commission argued that the Commission's actions were warranted by the *ius commune*, they also maintained that a royal commission, authorized by the Act of Supremacy of 1559, exempted the High Commission from the requirements that the *ius commune* imposed on other religious courts. *See id.* at 977, 978-79.

74. Some suspects who submitted to the *ex officio* oath objected later to answering particular questions. These suspects asserted essentially the same principles as those who challenged the authority of the High Commission to administer the oath initially. Helmholz reports that they were required to answer when

there was public knowledge that a crime had been committed . . . the public had an interest in punishing the crime, and . . . there were legitimate indicia that the defendant being questioned had committed it. This was an accepted principle in the criminal law. Following its mandate, under principles of the *ius commune*, defendants had no right to refuse . . . to answer specific questions about their crimes.

*Id.* at 983 (footnotes omitted).

Critics of the High Commission sometimes objected to its procedures for reasons other than the lack of a sufficient evidentiary basis for questioning. For one thing, they argued that forcing people to answer incriminating questions under oath tempted them to commit perjury.<sup>75</sup> This objection would have been as forceful in cases of questioning on strong suspicion as in cases of questioning on light suspicion. When defendants testify under oath, an objection to forcing them to choose among perjury, contempt, or self-accusation — a choice that the Supreme Court has called a “cruel trilemma”<sup>76</sup> — has the potential of creating a broader privilege than the privilege of insisting on an adequate evidentiary foundation for questioning. This objection appears to condemn forcing people to answer incriminating questions under oath altogether.

Something like this objection may have been among the circumstances that led common law courts to disqualify criminal defendants and other interested parties from providing sworn testimony — testimony that, if false, might have jeopardized their souls.<sup>77</sup> In the *ius com-*

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75. *Id.* at 982.

76. The Supreme Court referred to the “cruel trilemma” as a justification for the privilege in *Murphy v. Waterfront Commn.*, 378 U.S. 52, 55 (1964). As Helmholtz notes, the phrase antedated this opinion. See Helmholtz, *supra* note 50, at 983 n.101. The word “trilemma” does not appear in most dictionaries, but the *Oxford English Dictionary* notes uses of the word in 1672, 1690, 1725, 1860, and 1887. See 18 THE OXFORD ENGLISH DICTIONARY 530-31 (2d ed. 1989).

77. That the common law’s testimonial disqualification was a “disqualification” and not a “privilege” might lead a modern observer to conclude that the disqualification was not intended to benefit the defendants. Being “disqualified” from doing something that other people do does not sound like a favor. Nevertheless, one should resist this conclusion. The testimonial disqualification of defendants served several purposes, one of which was to safeguard the defendants themselves.

The primary purpose of the disqualification probably was to keep untrustworthy evidence from the trier of fact. See *Rules of Evidence, No. III, Incompetency of Witness from Interest*, 6 AM. JURIST 18 (1831). In addition, the disqualification saved juries from the disturbing task of resolving swearing contests, contests that would have revealed the imperfection of the oath as a guarantor of truth. See Letter from George Fisher to author, June 6, 1996 (noting that common law procedure used several devices to avoid sworn credibility conflicts and suggesting that “our system only quite recently became comfortable with the idea that a jury could resolve credibility conflicts between sworn witnesses”).

Finally, the disqualification protected defendants. Whatever the law on the subject, the exercise of a privilege not to testify is likely to give rise to an unfavorable inference, and the temptation to commit perjury rather than to invoke this privilege is likely to be strong. Only an unyielding disqualification ensures that the government will not lead defendants to swear falsely and, perhaps, to condemn themselves to damnation. See *infra* text accompanying notes 140-47 (describing nineteenth-century opposition to abolition of the testimonial disqualification on these grounds).

One cannot know whether the goal of safeguarding defendants and, initially, other interested witnesses was among those prompting their disqualification or whether this

*mune*, however, the objection did not lead either to testimonial disqualification or to the establishment of a privilege of sworn witnesses always to decline to answer incriminating questions. Interrogation under oath remained permissible so long as public fame or an identified accuser provided an adequate evidentiary foundation.

During this early era, the discomfort generated by forcing suspects to answer under oath was great enough that the *ius commune* exempted false answers to incriminating questions from the penalties for perjury. False answers still were punishable as contempt, however, and in the seventeenth century, the temporal penalties for perjury were not the most important ones. Although critics of the High Commission objected that the moral trilemma confronting sworn suspects remained, this objection did not lead common law courts to prohibit involuntary administration of the *ex officio* oath by the Commission.<sup>78</sup>

Another, more technical objection to questioning by the High Commission found greater favor in the common law courts. These courts forbade questioning by the Commission that could effectively resolve either a civil or a criminal case that the common law courts had jurisdiction to decide.<sup>79</sup> Other privileges were available to suspects brought before the Commission as well, including a privilege not to be questioned concerning "secret thoughts."<sup>80</sup> No suspect, however, successfully asserted an unqualified privilege to refuse to respond to incriminating questions.

Charles Gray describes a habeas corpus action brought by Maunsell and Ladd in 1607 as "[t]he most concerted assault ever made on inquisition of any sort by any court."<sup>81</sup> In this case, two Puritan suspects who had been brought before the High Commission challenged the court's authority to ask incriminating questions, and they lost. Their case established the propriety of the Commission's interrogation under oath when (1) the case was within the High Commission's jurisdiction, (2) the Commission's questioning did not expose the person interro-

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purpose was a rationalization and an afterthought. Common law sources, however, asserted this rationale for refusing to permit defendants to testify at least as early as the late sixteenth century. See *infra* text accompanying notes 84-94.

78. See Helmholz, *supra* note 50, at 982-83, 985-86.

79. See Gray, *supra* note 60, at 355.

80. See *id.* at 360; Of Oaths before an Ecclesiastical Judge *ex Officio*, 12 Coke's Rep. 26 (3d ed. 1727), 77 Eng. Rep. 1308 (1606); Edwards's Case, 13 Coke's Rep. 9 (3d ed. 1727), 77 Eng. Rep. 1421, 1422 (K.B. 1609); LEVY, *supra* note 52, at 245-46 (discussing *Edwards's Case*, and *Jenner's Case*, Stowe MS. 424, fols. 159b-160a (1611)).

81. Gray, *supra* note 60, at 360-61.

gated to a risk of detriment in a common law proceeding, and (3) the Commission gave sufficient notice of the subject of its interrogation.

In summary, the common law courts enforced more than one privilege against the High Commission, but all of these privileges were compatible with the principles of ordinary morality articulated by Kent Greenawalt. The most important of these privileges — the privilege not to be subjected to incriminating interrogation under oath until a specific accuser or public fame provided a clear basis for suspicion — was in fact grounded on precisely the moral principles that Greenawalt later voiced.

**B. No Person Shall Be Compelled in Any Criminal Case To Be a Witness Against Himself**

The privilege against self-incrimination that the Framers included in the Bill of Rights of 1791 differed from the privilege that the English common law courts enforced against the High Commission. The Fifth Amendment, declaring that no person shall be compelled in any criminal case to be a witness against himself, plainly refers, not just to the initiation of criminal proceedings or to a first accusation, but to the conduct of the criminal trial.

By the time a felony defendant reaches trial, a strong basis for suspecting his guilt ought to be apparent,<sup>82</sup> and a privilege afforded to defendants who have been placed on trial after a showing of probable cause goes beyond Greenawalt's principles of morality. Unlike the limited privilege of the *ius commune*, the Fifth Amendment's privilege was not designed merely to guarantee an adequate evidentiary basis for interrogation. The Constitution affords an absolute privilege, one that no evidentiary showing can overcome.<sup>83</sup>

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82. The Fifth Amendment not only sets forth the privilege against self-incrimination but also provides that "[n]o person shall be held to answer for a capital, or otherwise infamous, crime unless upon presentment or indictment by a Grand Jury." U.S. CONST. amend. V.

83. In one respect, however, the Fifth Amendment's formulation of the privilege is narrower than the *maxim nemo tenetur prodere seipsum*. The Fifth Amendment speaks only of compulsion to be a witness in a criminal case, but the older maxim could be invoked successfully when there was no risk of criminal punishment but merely a risk of civil liability or of injury to reputation. See, e.g., *Ullmann v. United States*, 350 U.S. 422, 449-54 (1956) (Douglas, J., dissenting); *Brown v. Walker*, 161 U.S. 591, 631-35 (1896) (Field, J., dissenting); *Respublica v. Gibbs*, 3 Yeates 429, 437 (Pa. 1802); LEVY, *supra* note 52, at 423-24, 427; ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES 77 (Hartford, Oliver D. Cooke 1810) ("It is a rule of evidence in civil cases, that no man is compellable to testify against his interest, or to answer any question that will render him liable to an action, charge him with a debt, or subject him to a penalty or forfeiture."); *id.* at 79-80 ("A witness is not bound



In assessing what this constitutional privilege meant to the people who enacted it, manuals used to instruct justices of the peace on the conduct of their offices offer a helpful starting point. For nearly 300 years, from 1584 through the mid-nineteenth century, these manuals declared that the *nemo tenetur* principle precluded the interrogation of suspects under oath.<sup>84</sup> One of the most frequently used manuals in colonial America, Dalton's *Countrey Justice*, first published in England in 1618, declared, "The offender himself shall not be examined upon oath; for by the common law, *Nullus tenetur seipsum prodere*."<sup>85</sup>

A manual published in 1745 explained:

The Law of *England* is a Law of Mercy, and does not use the Rack or Torture to compel Criminals to accuse themselves . . . I take it to be for the same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of some Men, although they have been guilty of Offences. . . . The Law has

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to answer questions, the direct object and immediate tendency of which are to degrade, disgrace, and disparage the witness, and shew his turpitude and infamy . . ."); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 164 & n.336 (1992); Wigmore, *supra* note 32, at 85.

84. For what may be the earliest example, see ANTHONY FITZHERBERT & RICHARD COMPTON, *L'OFFICE ET AUCTIONITIE DE JUSTICES DE PEACE* 152 (P.R. Glazebrook ed., 1972) (1584).

For obvious reasons early champions of the privilege against self-incrimination rarely argued that statements made under oath were less reliable than unsworn statements. Nevertheless, Akhil Amar and Renée Lettow, contending that the historic purpose of the privilege was to protect against the use of unreliable evidence, recently proposed a procedure that they called "a solution remarkably like the early scope of the privilege." Amar & Lettow, *supra* note 32, at 898. Amar and Lettow would permit prosecutors to take the depositions of criminal suspects under oath. "The penalty for refusing to answer would be contempt, and the penalty for lying would be perjury." *Id.* at 898-99 (footnotes omitted). Although prosecutors would not be allowed to use the suspects' statements against them at trial, they would be permitted to introduce evidence derived from these statements — both physical evidence and the testimony of witnesses whose existence, location, and identity the suspects had disclosed. This solution "remarkably like the early scope of the privilege" seems more closely to resemble the evil that the privilege was intended to remedy. See Dripps, *supra* note 34, at 1565-66, 1623-35 (offering a powerful — indeed overwhelming — rejoinder to Amar and Lettow's historical account, suggesting that Amar and Lettow have it backwards, and demonstrating the odd incentives that Amar and Lettow's proposal would create for law enforcement officers). For a discussion of how sharply Amar and Lettow's proposal departs from a century of more recent history, see Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995). For Amar and Lettow's rejoinder, see Akhil Reed Amar & Renée B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011 (1995).

85. MICHAEL DALTON, *THE COUNTRY JUSTICE* 273 (Professional Books 1973) (1619).

therefore wisely and mercifully laid down this Maxim, *Nemo tenetur seipsum prodere*.<sup>86</sup>

Nineteenth-century American manuals substituted the language of the Bill of Rights for the familiar Latin maxim:

No man shall be compelled to give evidence against himself. Hence it is held that if a criminal be sworn to his examination taken before a justice, it shall not be read against him.<sup>87</sup>

The prisoner is not to be examined on oath, for this would be a species of duress, and a violation of the maxim, that no one is bound to criminate himself.<sup>88</sup>

All of these manuals noted the coercive force of an oath (a force derived from both the secular penalties for perjury and the supernatural sanctions for falsely invoking God's name), and they linked the disqualification of suspects and defendants from testifying under oath to the privilege against self-incrimination.

The claim that incriminating interrogation under oath is forbidden for the same reason that torture is forbidden was asserted by religious dissenters in England and embraced by religious dissenters in America. In about 1591, Thomas Cartwright and eight Puritan colleagues objected that the *ex officio* oath "put the conscience uppon the racke."<sup>89</sup> In 1637 John Lilburne declared before the Star Chamber that "no man[']s conscience ought to be racked by oaths imposed."<sup>90</sup> Five years later in the winter of 1641-1642, the governor of the Plymouth Colony asked the colony's ministers and magistrates "[h]ow far a magistrate may extract a confession from a delinquent to accuse himself of a capital crime seeing *nemo tenetur prodere seipsum*."<sup>91</sup> One of the three sur-

86. THEODORE BARLOW, *THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE* 189 (London, Henry Lintot 1745), quoted in John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1085 n.157 (1994).

87. AUGUSTIN S. CLAYTON, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* (Milledgeville, S. Grantland 1819), quoted in Eben Moglen, *Taking the Fifth: Reconsidering the Constitutional Origins of the Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1128 (1994).

88. See 1 THOMAS STARKIE, *PRACTICAL TREATISE ON THE LAW OF EVIDENCE* 51-52 (Theron Metcalf ed., Boston, Wells & Lilly 1826).

89. Thomas Cartwright, *Treatise on the Oath Ex Officio*, in *CARTWRIGHTIANA* 33 (Albert Peel & Leland H. Carlson eds., 1951), quoted in LEVY, *supra* note 52, at 177.

90. John Lilburne, *The Just Defence of John Lilburn*, in *THE LEVELLER TRACTS 1647-1653*, at 450, 454 (William Haller & Godfrey Davies eds., 1944) (containing Lilburne's description of his Star Chamber prosecution, written at the time of his 1653 treason trial).

91. WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION, 1620-1647*, at 407 (Samuel E. Morison ed., 1952).

viving responses exhibited little shyness about asking incriminating questions of unsworn suspects or about pressing these suspects through "force of argument." It declared, however, that physical force, threats of increased punishment, and interrogation under oath were all impermissible:

I conceive that a magistrate is bound, by careful examination of circumstances and weighing of probabilities, to sift the accused; and by force of argument to draw him to an acknowledgment of the truth. But he may not extract a confession of a capital crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishment inflicted or threatened to be inflicted, for so he may draw forth an acknowledgment of a crime from a fearful innocent. If guilty, he shall be compelled to be his own accuser, when no other can, which is against the rule of justice.<sup>92</sup>

Summarizing the responses that the governor received, John Winthrop saw two principles at work: first, a principle that one might call "the Greenawalt principle," affording suspects a right to silence in cases of light suspicion but not when a strong evidentiary basis for interrogation existed; and second, an unqualified prohibition of torture and of requiring suspects to answer under oath:

[When a crime has been committed] and one witness or strong presumptions do point out the offender, there the judge may examine him strictly, and he is bound to answer directly, though to the peril of his life. But if there be only light suspicion, &c. then the judge is not to press him to answer . . . but he may be silent, and call for his accusers. But for examination by oath or torture in criminal cases, it was generally denied to be lawful.<sup>93</sup>

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92. *Id.* (response of Ralph Partrich). A second response condemned the oath *ex officio* and the infliction of punishment for failure to confess but emphasized that "[a] magistrate cannot without sin neglect diligent inquisition into the cause brought before him." This response added, "[I]f it be manifest that a capital crime is committed, and that common report or probability, suspicion or some complaint (or the like), be of this or that person, a magistrate ought to require, and by all due means to procure from the person . . . a naked confession of the fact." The failure of a magistrate to fulfill this duty would "betray his country and people to the heavy displeasure of God." *Id.* at 405-06 (response of John Rayner).

The third response condemned "extract[ing] a confession from a delinquent by an oath in matters of life or death." Nevertheless, so long as the "presumptions are strong" and the matters are "of highest consequence, such as do concern the safety or ruin of states or countries, magistrates may proceed so far to bodily torments, as racks, hot irons, etc. to extract a confession." *Id.* at 412-13 (response of Charles Chauncy). For Charles Chauncy, later the President of Harvard College, see *id.* at 314 n.4, placing a suspect on oath apparently was more offensive than torture. Although torture was to be used only sparingly in capital cases, interrogation under oath was impermissible.

93. 2 JOHN WINTHROP, HISTORY OF NEW ENGLAND 47 (J. Savage ed., 2d ed., Boston, Little, Brown and Co. 1826). In 1637 the General Court of Massachusetts sum-

In 1677 the Virginia House of Burgesses declared that forcing suspects to answer incriminating questions under oath was incompatible with their natural rights. In the aftermath of Bacon's Rebellion and its suppression, the House resolved "that a person summoned as a witness against another, ought to answer upon oath, but noe law can compell a man to sweare against himselfe in any matter wherein he is lyable to corporall punishment."<sup>94</sup>

These sources and others discussed below support this judgment: The Fifth Amendment privilege prohibited (1) incriminating interrogation under oath, (2) torture,<sup>95</sup> and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency.<sup>96</sup> The Amendment prohibited nothing more, or at least the sources

moned John Wheelwright to account for his unorthodox religious views. The General Court assured him, however, that he would not be examined "by any compulsory means, as by oath, imprisonment, or the like." LEVY, *supra* note 52, at 342.

94. 2 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 422 (William W. Hening ed., Richmond, The Franklin Press 1820).

95. Although John Langbein maintains doubtfully that England's prohibition of torture was effected "before the first traces of the privilege at common law," Langbein, *supra* note 86, at 1085, Americans of the founding generation unmistakably saw the privilege as a safeguard against torture. See LEVY, *supra* note 52, at 430; Amar & Lettow, *supra* note 32, at 865 n.20. In addition to the sources cited by these works, see 1 LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 275 (Philadelphia, P. Byrne 1804) (declaring that one purpose of the privilege is to outlaw torture). English sources similarly described the privilege as forbidding torture. See Solom Emlin, *Preface* to 1 COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH TREASON iv (2d ed., London, J. Walthoe 1730) ("In other Countries, Racks and Instruments of Torture are applied to force from the Prisoner a Confession, sometimes of more than is true; but this is a Practice which Englishmen are happily unacquainted with, enjoying the benefit of that just and reasonable Maxim, *Nemo tenetur accusare seipsum* . . .") (footnote omitted); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (London, MacMillan & Co. 1883) ("[T]he assertion that the maxim, '*Nemo tenetur accusare seipsum*,' was part of the law of God and of nature . . . was all the more popular because it condemned the practice of torture for purposes of evidence, then in full use both on the Continent and in Scotland."). Herman, *supra* note 83, collects and discusses these sources at 178-79.

96. Under the common law of evidence, such threats and promises rendered out-of-court confessions involuntary. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12 (1979). Wigmore insisted that the law of voluntariness developed independently of the principle *nemo tenetur seipsum prodere*. See 8 WIGMORE, *supra* note 4, § 2266. He assailed the Supreme Court for declaring in *Bram v. United States*:

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

168 U.S. 532, 542 (1897). See 3 WIGMORE, *supra* note 4, § 823, at 337 n.2.

mention nothing more.<sup>97</sup> The Self-Incrimination Clause neither mandated an accusatorial system nor afforded defendants a right to remain silent. It focused upon improper methods of gaining information from criminal suspects.

If this understanding of the original understanding is correct, critics of the Fifth Amendment privilege have missed the mark. Although the intensity of the framers' disapproval of sworn statements by suspects may seem foreign to us today, the policies that informed the privilege were coherent and compelling, and they were not in tension with ordinary morality. When Ann has a strong basis for suspecting that Betty has stolen her property, ordinary morality may permit Ann to interrogate Betty and to draw an adverse inference if she refuses to respond. Ordinary morality, however, does not permit Ann to place Betty on the rack or to insist that Betty swear upon threat of imprisonment for falsehood or silence that her explanation is true. When critics have spoken harshly of the privilege against self-incrimination, they have assumed that it afforded more than a right to be free of inhuman methods of in-

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Recently, however, Lawrence Herman noted several occasions in the seventeenth, eighteenth, and early nineteenth centuries when treatise writers, courts, counsel, and a member of the House of Lords described the requirement that guilty pleas and other confessions be voluntary as one incident of the *nemo tenetur* principle. See Herman, *supra* note 83, at 143-47, 152-53, 168-69. Herman advanced other reasons for doubting Wigmore's claim that the privilege and the requirement of voluntariness were entirely independent of one another, including the fact that both doctrines were described as forbidding torture. See *id.* at 177-80. Charles McCormick once remarked that although the two doctrines had arisen at different times, the kinship between them was "too apparent for denial." Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 453 (1938).

Even if, as Wigmore claimed, "the privilege" antedated the requirement of voluntariness by 100 years, the requirement that confessions be voluntary antedated the Fifth Amendment. See, e.g., *R. v. Rudd*, 168 Eng. Rep. 160, 161 (K.B. 1775). The Framers of the Fifth Amendment might well have assumed that their prohibition of "compulsion" to incriminate oneself included a requirement that confessions be "uncompelled" or voluntary. There is little reason to suppose that the unqualified language of the Fifth Amendment and of other American formulations of the privilege merely reiterated the traditional English understanding of the *nemo tenetur* principle (whether the Americans knew that they were innovating or not). Wigmore's view notwithstanding, the reading of the Fifth Amendment offered by *Bram v. United States* seems at least plausible both textually and historically.

97. In seeking the target of an unqualified privilege against compulsory self-incrimination, moreover, inhuman methods of interrogation seem a more promising candidate than the ability to ask questions and expect answers from people accused of crime. Henry Hart and Albert Sacks once wrote that in seeking the meaning of an ambiguous or unclear legislative enactment, one should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

terrogation. They have assumed that it afforded a right to silence — a right not to respond to incriminating questions at all. The evidence, however, is overwhelming that the privilege did not afford this right at the time that it appeared in the Bill of Rights.

What the Fifth Amendment privilege did not prohibit is in fact clearer than what it did. The privilege did not prohibit the forceful incriminating interrogation of suspects by judges and magistrates so long as the suspects remained unsworn. Unsworn suspects who refused to respond to the questions of English and American courts doubtless would have suffered no more severe sanction than the drawing of an adverse inference.<sup>98</sup> The procedures of the prenineteenth-century trial, however, would have made that disadvantage substantial in every case and devastating in most. The privilege did not afford suspects a right to suffer no consequences for their refusal to speak.<sup>99</sup>

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98. One cannot know much, however, about what common law judges would have done if unsworn defendants had refused to answer, for during the centuries prior to the Bill of Rights, almost none did. One who did — the first, apparently — was John Udall. When Udall was tried for seditious libel in 1590, the court invited the jury to consider his silence as evidence of his guilt. He was convicted and sentenced to death, and he died in prison. See LEVY, *supra* note 52, at 168-70; Herman, *supra* note 83, at 120-21.

The most prominent of the common-law defendants to assert a right to silence was John Lilburne, the most famous of the Levellers. Lilburne earlier had objected to *ex officio* proceedings in the Court of Star Chamber, although he had declined to answer only questions concerning unspecified charges. During his common law trial for treason in 1649, he claimed many nonexistent rights. When Lilburne refused to say at his trial whether he had written a particular document, the attorney general quarreled with him. Other proof of Lilburne's authorship was at hand, however, and the court imposed no formal sanction for his refusal. Trial of John Lilburne, 4 How. St. Tr. 1269, 1340-41 (1649).

At his arraignment, Lilburne declared, "[B]y the Laws of England, I am not to answer questions against or concerning myself," and the presiding judge replied, "You shall not be compelled." 4 How. St. Tr. at 1292-93. This response should not be read as an expression of the court's approval of Lilburne's claim or as a promise that no inference would be drawn from his failure to respond. The statement might simply have recognized that English law authorized no formal, judicially imposed punishment when a person who had not been summoned or sworn as a witness declined to speak. Lilburne was subject to the same informal pressure to speak as other defendants, and he did not remain at all silent at his trial.

With very few exceptions, only suspects brought before the prerogative courts and other sworn witnesses ever invoked the maxim *nemo tenetur seipsum prodere*. As Lawrence Herman suggests, a common law defendant who remained silent during a pretrial examination would have been denied bail, and silence before or during trial would have been called to the attention of the trier of fact. See Herman, *supra* note 83, at 124 (citing JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 11 (1974)).

99. The imposition of formal sanctions for silence might have been regarded as "torture" forbidden by the privilege, but there is a difference between withholding punishment for conduct and approval of that conduct. Although a suspect might have a

John Langbein has distinguished between two historic models of the criminal trial: the "accused speaks" trial and the "testing the prosecution" trial.<sup>100</sup> He argues that the transformation of the "accused speaks" trial into the "testing the prosecution" trial began in the late eighteenth century when lawyers came to represent defendants in significant numbers. So long as defendants were unrepresented, no one could speak for them unless they spoke for themselves. In this situation, a right to remain silent would have been a right to commit suicide. Langbein notes that several other aspects of common law procedure also induced defendants to speak,<sup>101</sup> and the evidence is clear that in the sixteenth, seventeenth, and eighteenth centuries virtually all English defendants did speak.<sup>102</sup> One source described the criminal trial as an "altercation" between the defendant and his accusers.<sup>103</sup>

Trial, moreover, was not the only stage of the criminal process at which the accused was expected to speak. The Marian Committal Statute of 1555 required justices of the peace to interrogate suspects following their apprehension and to record anything "materiall to prove the felonie."<sup>104</sup> Until the mid-eighteenth century, the record of the defendant's pretrial examination was read routinely at her trial.<sup>105</sup> Courts then began to express a preference for hearing the defendant's account from the defendant herself, but the record of her pretrial examination remained available for impeachment purposes. If the defendant said something different at trial from what she had told the magistrate, the jury heard about it.<sup>106</sup>

Eben Moglen has reported that American criminal procedure throughout the colonial period and into the early republic corresponded

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right not to be imprisoned for refusing to answer, his refusal to answer might nevertheless be considered wrongful.

100. Langbein, *supra* note 86, at 1048.

101. *See id.* at 1055-66.

102. *See* J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1660-1800*, at 348-49 (1986) ("There was no thought that the prisoner had a right to remain silent on the grounds that he would otherwise be liable to incriminate himself. . . . [T]he assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence.").

103. *See* Langbein, *supra* note 86, at 1049 (quoting THOMAS SMITH, *DE REPUBLICA ANGLORUM*, bk. 2, ch. 23, at 114 (Mary Dewar ed., Cambridge University Press 1982) (1583, written circa 1565)).

104. 2 & 3 Phil. & M., ch. 10 (Eng.).

105. The defendant's statement often was read by the justice of the peace himself; this judicial officer frequently appeared as a witness against the defendant. *See* Langbein, *supra* note 86, at 1059-61.

106. *See id.* at 1060 n.58.

to the "accused speaks" model.<sup>107</sup> Moglen offers little direct evidence concerning the defendant's role at trial (little evidence seems to survive), but he does demonstrate that the Marian procedure was firmly in place. Justices of the Peace throughout America interrogated unsworn defendants, and these defendants' statements were used at trial.<sup>108</sup>

In England, lawyers were first permitted to represent criminal defendants in ordinary felony trials in the 1730s, and according to Langbein, "[t]he use of defense counsel remained a relative trickle for another half century, until the 1780s."<sup>109</sup> Within another half century, however, counsel had begun to work a substantial change in English criminal procedure. As early as 1820, the French visitor Charles Cottu wrote of the English trial: "[T]he defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute."<sup>110</sup> Cottu may have exaggerated, however, for "accused speaks" procedures apparently persisted into the 1820s and even the 1830s.<sup>111</sup> Criminal defendants had no right to remain silent until well into the nineteenth century.

Langbein argues that "the purpose of the [early] rule denying defense counsel was . . . diametrically opposed to the purpose of the privilege against self-incrimination,"<sup>112</sup> that "[t]he privilege against self-incrimination is the creature of defense counsel,"<sup>113</sup> and that "the real origins of the privilege against self-incrimination" are to be found in the decades in which "defense counsel broke up the 'accused speaks' trial."<sup>114</sup> These statements are accurate if, when Langbein refers to "the privilege against self-incrimination," he means "the right to remain silent" (as he seems to). The statements are not accurate, however, if Langbein means the privilege against self-incrimination that the Framers included in the Bill of Rights. *This* privilege was not the product of

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107. Moglen, *supra* note 87, at 1089.

108. *Id.* at 1094-99; see also JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE* 652-59 (1944) (demonstrating the use at trial of confessions before magistrates and inferring that defendants in colonial New York were "directly vulnerable to questioning from the bench").

109. See Langbein, *supra* note 86, at 1068. A statute in 1696 had permitted defense counsel to appear in treason trials.

110. CHARLES COTTU, *ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND* 73 (1822) (translation of *DE L'ADMINISTRATION DE LA JUSTICE CRIMINELLE EN ANGLETERRE* (1820)).

111. See Henry Smith, *The Modern Privilege: Its Nineteenth Century Origins*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* (R.H. Helmholz ed., forthcoming 1997) (manuscript on file with the author).

112. Langbein, *supra* note 86, at 1054.

113. *Id.* (emphasis omitted).

114. *Id.* at 1069.



lawyer-dominated trials or of the disappearance of "accused speaks" procedures.<sup>115</sup>

Congress submitted the Bill of Rights to the states in 1789, at the end of the decade in which, Langbein reports, defense attorneys first appeared in English criminal trials in significant numbers. In J.M. Beattie's estimate, lawyers represented nearly twenty percent of the defendants tried in the Old Bailey a few years before Congress's submission of the Fifth Amendment to the states,<sup>116</sup> and representation by counsel was rarer in America than in England.<sup>117</sup> Moreover, the Fifth Amendment's formulation of the privilege was not new; similar declarations had appeared in a number of state constitutions.<sup>118</sup> Indeed, in 1776, just prior to American independence, the Virginia Declaration of Rights had listed among the defendant's privileges, "[n]or can he be compelled to give evidence against himself."<sup>119</sup> At this time, even in London, only about two percent of all felony defendants were represented by counsel,<sup>120</sup> and only about 180 residents of the American colonies were lawyers in the sense that they had been trained at the Inns of Court.<sup>121</sup> The privilege against self-incrimination articulated by the Bill of Rights and by American state constitutions could not have been driven by lawyer-dominated trials.

Noting that "accused speaks" procedures existed side-by-side with constitutional declarations of the privilege against self-incrimination, Eben Moglen maintains that "Americans did not feel themselves immediately compelled to put their principles into practice."<sup>122</sup> The odds,

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115. At the conclusion of his essay, Langbein acknowledges that in denying the existence of the privilege against self-incrimination until the emergence of the lawyer-dominated trial, he has spoken in "a shorthand of sorts." *Id.* at 1084.

116. See J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 227 (1991).

117. See, e.g., GOEBEL & NAUGHTON, *supra* note 108, at 573 (revealing that "counsel was only occasionally employed in criminal cases" in eighteenth century New York); PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 86 (1992) ("[B]y the 1760s, counsel was *permitted* felony suspects in more than half the colonies.") (emphasis added); LEVY, *supra* note 52, at 369; John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 540 (Stanley N. Katz & John M. Murrin eds., 1983).

118. See Moglen, *supra* note 87, at 1118-21.

119. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3813 (Scholarly Press 1977) (1909), *quoted in* Moglen, *supra* note 87, at 1118.

120. Beattie, *supra* note 116, at 227 (tbl. 1).

121. LEVY, *supra* note 52, at 369.

122. Moglen, *supra* note 87, at 1111-12.

however, seem against this hypothesis. Legal systems sometimes are false to their ideals — as this article has contended that ours is when it combines lofty accusatorial rhetoric with tawdry interrogation and plea bargaining practices.<sup>123</sup> Nevertheless, people usually attempt to rationalize their practices in terms of their ideals. That the Framers of the Constitution articulated constitutional principles without advertence to the fact that these principles were flatly inconsistent with their everyday practices seems unlikely. A more promising hypothesis is that the Framers saw no tension between their courtroom procedures and the principles that they declared in the Constitution.

If someone had argued to judges of the founding generation that their “accused speaks” procedures violated the privilege against self-incrimination, they might have offered any or all of three responses. These responses would have denied each and every element of a violation of the privilege:

First, far from compelling any defendant to be a *witness* against himself, we do not permit any defendant to be a witness against (or for) himself. The defendant is disqualified from giving evidence partly because we are concerned that placing him on oath would be incompatible with his privilege.<sup>124</sup>

Second, if our procedures compel defendants to do anything, it is not to *incriminate* themselves. We do not press defendants to admit their guilt. To the contrary, we want to hear anything that they may be able to say in their defense. When an occasional defendant attempts to plead guilty, we in fact discourage him.<sup>125</sup> If there is any tilt to our procedures, we press defendants to *exculpate* rather than to incriminate themselves.

Third, our procedures do not in fact *compel* anyone to do anything. If a defendant were to refuse to respond to judicial questions or to the charges against him, we would impose no punishment for his refusal. We would merely permit the jury to draw whatever inference seemed appropriate in determining whether he was guilty of the offense with which he

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123. See *supra* text accompanying notes 36-47.

124. Perhaps judges of the early American republic would not have pressed this response too hard. True, the resolution of the Virginia House of Burgesses in 1677 declared that “noe law can compell a man to *sweare* against himselfe in any matter wherein he is lyable to corporall punishment”; the Virginia Declaration of Rights proclaimed a century later, “[N]or can he be compelled to give *evidence* against himself”; and the federal Bill of Rights provided, “No person shall be compelled in any criminal case to be a *witness* against himself.” One doubts, however, that the authors of these provisions would have limited the privilege to sworn statements if the statements of an unsworn defendant who had been tortured were offered at his trial.

125. See Alschuler, *supra* note 96, at 7-13; see also BEATTIE, *supra* note 102, at 336-37, 446-47.

was charged. Permitting a jury to draw a fair inference is a far cry from torture, placing a defendant upon oath, or any other form of compulsion.

None of these judicial responses would have been plausible if defendants had been examined under oath. Then the defendant would have been a witness; he would have been subject to compulsion (the punishment for perjury) if he failed to speak the truth; and if the truth were incriminating, his oath would have pressed him to incriminate himself.

Some early sources emphasized that placing a suspect under oath tempted him to commit perjury. The principal concern of these sources was to prevent what modern lawyers would call entrapment — that officials might prompt a suspect to commit a crime that he would have avoided in the absence of the officials' enticing conduct. The new crime, moreover, would be perjury, an offense that would not only subject the suspect to temporal punishment but also jeopardize his soul.

Other sources referred to the oath as compulsion, a form of "violence" akin to torture. Their concern appeared to be, not that the suspect would be induced to commit perjury, but rather that he would be compelled by improper methods to confess his crime. Concerns about tempting suspects to commit perjury may in fact have blended with concerns about compelling them to incriminate themselves; the choice among perjury, contempt, and self-incrimination was indeed a "cruel trilemma."<sup>126</sup>

Whatever their reasons, the manuals for justices of the peace in England and America consistently emphasized that the suspect was not to be sworn when examined.<sup>127</sup> In two eighteenth-century English cases, justices of the peace overlooked the manuals' admonitions and administered oaths to suspects before examining them. In both cases, judges excluded the suspects' statements from evidence at trial. In one case, the judge remarked, "If [the examination] is upon Oath it cannot be read, for Persons are not to swear against themselves; all Examinations ought to be taken freely and voluntarily, and not upon Oath, and then we can read them."<sup>128</sup> A pamphlet report of the second case explained:

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126. See 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 225, at 262-63 (Boston, Charles C. Little & James Brown 1842) (explaining why a pretrial statement made under oath cannot be considered voluntary and linking the testimonial disqualification of defendants both to the *nemo tenetur* principle and to the concern that defendants should not be tempted to commit perjury).

127. See, e.g., A NEW CONDUCTOR GENERALIS 158 (Albany, D. & S. Whiting 1803); see also Moglen, *supra* note 87, at 1098.

128. 4 Selected Trials at the Sessions - House in the Old - Bailey 26-27 (photo. reprint 1985) (1742) (trial of Sarah Malcolm, O.B.S.P. (Feb. 4, 1733)); see also Langbein, *supra* note 86, at 1079 n. 142 (describing the trial).

[T]he confession was produced; but it being taken on oath, it could not be read. If it had been taken voluntarily it would have been admitted as good evidence; but the law supposes that an oath is compulsion; and consequently that no man is obliged to swear against himself in cases where it affects his life.<sup>129</sup>

The courts' unwillingness to receive sworn, self-incriminating testimony explains what otherwise would seem a paradox: that witnesses for the prosecution and witnesses in civil cases were much more likely to invoke the privilege — and to do so successfully — than criminal defendants.<sup>130</sup> Unlike defendants, prosecution witnesses and witnesses in civil cases were sworn, and when they invoked the privilege, the courts forbade other trial participants from asking them incriminating questions. At least by 1700, both sworn defendants in religious courts and sworn witnesses in common law courts were permitted to decline to answer any questions that could lead to criminal punishment or forfeiture.<sup>131</sup> Once a witness was sworn, he was subject to compulsion, and his only protection lay in the ability to decline to answer specific questions. The protection of common law defendants, by contrast, lay in not being sworn at all.

Eben Moglen offers persuasive evidence that American courts did not view the answers of unsworn defendants in the same light as those of sworn witnesses.<sup>132</sup> Following ratification of the Fifth Amendment, some American lawyers began to object on nonconstitutional grounds to the pretrial interrogation of defendants by justices of the peace. These lawyers noted that, although American law generally incorporated the common law of England, it did not, in the absence of legislative provision to the contrary, incorporate English statutory law. Because the pretrial examination of defendants was authorized by a statute, the Marian Committal Statute of 1555, the lawyers contended that American law did not allow this procedure.

Neither the lawyers nor the commentators who advanced this argument supplemented it with a claim that the pretrial examination of suspects violated either the Fifth Amendment privilege against self-incrimination or the similar provisions of state constitutions. If anyone had thought that the Constitution guaranteed a right to remain silent or

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129. BEATTIE, *supra* note 102, at 365 n.129 (internal quotation marks omitted). This case is also described in Langbein, *supra* note 86, at 1079 n.142.

130. See, e.g., Langbein, *supra* note 86, at 1078-80.

131. See 8 WIGMORE, *supra* note 4, § 2250, at 284, 289-90. In the trial of Sir John Freind, 13 How. St. Tr. 1, 17 (1696), Lord Chief Justice Treby said of a witness, "no man is bound to answer any questions that will subject him to a penalty or to infamy."

132. See Moglen, *supra* note 87, at 1126-27.

that "accused speaks" procedures were inconsistent with the privilege, this would have been the occasion to say so. During three decades of debate over whether the Marian Committal Statute was a Parliamentary innovation or merely declarative of the common law, however, no one did. Even the opponents of "accused speaks" procedures did not consider them inconsistent with the constitutional privilege against self-incrimination.

### C. *You Have a Right to Remain Silent*

The transformation of the privilege into a right of criminal defendants to remain silent occurred only during the nineteenth century. Lawyering of the trial contributed to a changed ideology of criminal procedure — one in which the dignity of defendants lay not in their ability to tell their stories fully, but rather in their ability to remain passive, to proclaim to the prosecutor "Thou sayest," and to force the state to shoulder the entire load. As defendants participated less in the proceedings that determined their fate, they were seen more as objects or as targets of the coercive forces of the state.

In Parliamentary debates of the 1820s and 1830s, reformers complained that "accused speaks" procedures often worked unfairly. Many defendants were not sufficiently educated and articulate to tell their stories coherently. The remedy that the reformers sought, however, was not the declaration of a right to remain silent; instead, they proposed giving defense attorneys the power to argue on the defendants' behalf before juries. The expansion of the role of counsel which they secured in 1836 permitted defendants to take a still more passive role at trial and contributed to the rapidly changing ideology of English procedure.<sup>133</sup>

An 1838 opinion declared that "[a] prisoner is not to be entrapped into making any statement" and that a magistrate should advise this suspect before taking his statement "that what he thinks fit to say will be taken down, and may be used against him on his trial."<sup>134</sup> A clearer doctrinal recognition of the right to remain silent came ten years later in Sir John Jervis's Act. This Act provided that, before the pretrial examination, the accused should be cautioned that he need not answer and that if he did answer, his answers could be used against him at trial.<sup>135</sup> In New York City, magistrates began routinely to caution defendants in

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133. See Smith, *supra* note 111, at 24-29.

134. R. v. Arnold, 173 Eng. Rep. 645, 645-46 (K.B. 1838).

135. See 11 & 12 Vict., ch. 42, § 18 (1848) (Eng.).

1835, the number of defendants who declined to submit to pretrial interrogation increased thereafter.<sup>136</sup>

A more significant doctrinal development than the magistrates' cautioning of suspects was the abolition of the testimonial disqualification of defendants. In 1864 Maine became the first American jurisdiction to allow defendants to offer sworn testimony in criminal cases,<sup>137</sup> and other states quickly followed. The British Parliament, a latecomer to the movement, enacted its competency statute in 1898.<sup>138</sup> By the end of the nineteenth century, Georgia was the only American state to retain the common law disqualification. It did not permit defendants to offer sworn testimony until 1962.<sup>139</sup>

The statutes that ended the testimonial disqualification of defendants were controversial, and the controversy centered on constitutional issues.<sup>140</sup> Proponents maintained that defendants should have the same right as other witnesses to testify under oath and that the common law disqualification substituted a presumption of perjury for the presumption of innocence.<sup>141</sup> Opponents contended, however, that the statutes threatened the privilege against self-incrimination.<sup>142</sup> They argued that jurors would view the failure of a lawyer to call his client to the witness stand as a confession of the client's guilt and that the jurors would draw this inference regardless of whatever cautionary instructions they received. In practice, defendants would be pressed to take the oath; they would be subject to precisely the compulsion that state and federal constitutions condemned.<sup>143</sup> Many defendants, moreover, would respond by committing perjury. Sir James Stephen wrote, "[I]t is not in human nature to speak the truth under such pressure as would be brought to bear

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136. See Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & SOC'Y. 443, 452 (1995).

137. See Act of Mar. 25, 1864, ch. 280, 1864 Me. Laws 214 (codified as amended at ME. REV. STAT. ANN. tit. 15, § 1315 (West 1994)).

138. The Criminal Evidence Act of 1898, 61 & 62 Vict., ch. 36 (Eng.).

139. See GA. CODE ANN. §§ 24-9-20, 17-7-28 (Michie 1995).

140. See *Ferguson v. Georgia*, 365 U.S. 570, 578-79 (1961); Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 115 (1981-82).

141. Perhaps the earliest and certainly one of the most earnest proponents of this position was Jeremy Bentham. See 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 381-90, 393-97 (Garland repr. 1978) (1827).

142. See *Ferguson*, 365 U.S. at 578-80; Bodansky, *supra* note 140, at 115.

143. See, e.g., Seth Ames, *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443, 444 (1867) ("In its actual workings, it will be found that this new statute will inevitably compel the defendant to testify, and will have substantially the same effect as if it did not go through the mockery of saying that he might testify if he pleased."). I am grateful to George Fisher for this reference.

on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion."<sup>144</sup>

In deference to constitutional concerns, most competency statutes, including the federal statute of 1878,<sup>145</sup> provided that the prosecutor could not comment on the failure of a defendant to testify and that no presumption against the defendant would arise from his failure to take the stand.<sup>146</sup> Some courts later suggested that the statutes would have been invalid without these provisions.<sup>147</sup> Placing defendants under oath

144. JAMES FITZJAMES STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 202 (London and Cambridge, MacMillan & Co. 1863); see Ames, *supra* note 143, at 448 ("The guilty . . . will add the crime of perjury to the crime set forth in the indictment. Even of the innocent, some, under the influence of terror and anxiety, may mix some falsehood with the truth, and so increase the embarrassment and aggravate the damages of their position.").

145. Act of Mar. 16, 1878, 20 Stat. 30 (codified at 18 U.S.C. § 3481 (1994)).

146. See *Ferguson*, 365 U.S. at 580; Bodansky, *supra* note 140, at 126.

147. See *Ruloff v. People*, 45 N.Y. 213, 222 (1871); *Staples v. State*, 14 S.W. 603 (Tenn. 1890); *Price v. Commonwealth*, 77 Va. 393, 395 (1883) (indicating that without the no-comment provision, the competency statute would have been incompatible with the presumption of innocence); *State v. Taylor*, 50 S.E. 247, 249-50 (W. Va. 1905); Bodansky, *supra* note 140, at 126.

The first competency statute, which was enacted in Maine, did not include a provision forbidding adverse comment on a defendant's failure to testify. The Maine Supreme Court not only upheld the constitutionality of this statute but also held that the privilege against self-incrimination did not preclude juries from considering a defendant's failure to testify as evidence of his guilt. See *State v. Bartlett*, 55 Me. 200 (1867). The court noted that "[f]rom time immemorial the . . . silence of the accused person, when charged, has been regarded as legitimate evidence" and that "refusals to account for the possession of stolen property, are evidences of guilt admitted." 55 Me. at 217. Ignoring an important limitation that a treatise writer included in his description of the circumstances in which an inference from silence was appropriate, the court quoted this description in support of its ruling: "'Where a man at full liberty to speak *and not in the course of a judicial inquiry* is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury.'" 55 Me. at 218 (citing WHARTON'S CRIMINAL LAW 320) (emphasis added).

The court did not advert to the distinction between drawing an adverse inference from the silence of an unsworn person, which the privilege against self-incrimination never had precluded, and pressing a person to answer incriminating questions under oath, which it had. See also *State v. Cleaves*, 59 Me. 298, 301 (1871) (Appleton, C.J.) ("Extrajudicial non-responson, when a charge is made, is always regarded as an article of circumstantial evidence. . . . Is [the defendant's] silence of any less probative force, when thus in court called upon to contradict or explain . . . ?"). In 1879, the Maine legislature, "looking for a more careful protection" of the privilege against self-incrimination than the state's supreme court had provided, see *State v. Banks*, 78 Me. 490, 492 (1886), declared that a defendant's failure to testify should not be treated as evidence of his guilt. See Me. Stat. 1879, ch. 92, § 6. The Maine court later declared, "We think the intent of the statute is that the jury, in determining their verdict, shall entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness." *Banks*, 78 Me. at 492. I am grateful to George Fisher for leading me to the Maine sources.

apparently was constitutional only because defendants were thought to have an unfettered option to decline to take the witness stand without suffering any consequence.

Some competency statutes expressly preserved the defendant's power to make an unsworn statement to the jury. Following the English Criminal Evidence Act of 1898, for example, defendants were allowed either to testify from the witness stand or to make an unsworn statement from the prisoner's dock. The sense that unsworn statements were worthless, however, led Parliament to abolish the option of speaking from the dock in 1982.<sup>148</sup> Most American jurisdictions had reached the same conclusion long before. Today, Massachusetts may still allow defendants to decide whether to offer sworn or unsworn statements,<sup>149</sup> but no other state gives defendants this option.

Following the enactment of competency statutes, the law in some jurisdictions technically might have been that, although jurors could draw no lawful inference from a defendant's failure to testify under oath, they could lawfully consider the defendant's failure to make an unsworn statement.<sup>150</sup> This distinction, however, was too thin to be maintained. When defendants, in practice, spoke only from the witness stand and when jurors were forbidden to draw an inference from their failure to take the stand, defendants had a right to remain silent at trial.

In 1965 *Griffin v. California* held that prosecutorial or judicial comment on a defendant's failure to testify violated the Fifth Amendment privilege.<sup>151</sup> The Framers of the Fifth Amendment, who might not have approved of sworn testimony by defendants at all, probably would have agreed that a defendant's refusal to submit to the compulsion of an oath could not be the subject of adverse comment. *Griffin*, however, forbade comment not simply on the refusal of a defendant to submit to an oath, but "on the accused's silence."<sup>152</sup> The Court offered no indication that refusal to submit to an oath might differ from any other form of silence, and one year after *Griffin*, the Court extended the right to remain silent to unsworn suspects in custody in *Miranda v. Arizona*. That the presence or absence of an oath might have made a difference seemed inconceivable in 1966. Because an unsworn statement made in

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148. See Criminal Justice Act, 1982, ch. 48, § 72 (Eng.).

149. It has been seventy years, however, since the Supreme Judicial Court's last reiteration of the defendant's ability to offer an unsworn statement. See *Commonwealth v. Stewart*, 151 N.E. 74 (Mass. 1926).

150. In other jurisdictions, the ability to make an unsworn statement did not survive the enactment of competency statutes. See Bodansky, *supra* note 140, at 117 n.113.

151. 380 U.S. 609 (1965).

152. 380 U.S. at 615.



response to police interrogation would be used against a suspect at trial, it was the "functional equivalent" of testimony. The distinction between sworn and unsworn statements, central to the framers' understanding of what it meant to be compelled to testify, had disappeared.

In 1987 *Rock v. Arkansas* held that the Constitution guaranteed defendants a right to testify under oath<sup>153</sup> — a right the framers might have characterized as the right to be compelled. Turning the original understanding of the constitutional privilege on its head, the Supreme Court declared, "The opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony."<sup>154</sup>

In the years since *Miranda*, Americans have seemed increasingly enamored of its accusatorial rhetoric, especially as they have learned that *Miranda*'s system for protecting the Fifth Amendment privilege has little practical effect.<sup>155</sup> During the Reagan administration, the Justice Department proposed abandoning *Miranda*,<sup>156</sup> but its proposal generated considerable criticism even among police administrators.<sup>157</sup>

England, by contrast, has reassessed the value of "testing the prosecution" trials. The Criminal Justice and Public Order Act of 1994 provides that, once an accused has been warned of the consequences of a failure to testify, "the court or jury . . . may draw such inferences as appear proper from the failure of the accused to give evidence."<sup>158</sup> In

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153. See *Rock v. Arkansas*, 483 U.S. 44 (1987).

154. 483 U.S. at 52. The Court's logic was no stronger than its history. Denying an opportunity to testify ensures that testimony will not be compelled. To say that a person cannot be compelled to do what she is not permitted to do may be odd, but the Fifth Amendment plainly did forbid compelling defendants to be witnesses against themselves at a time when they were not permitted to be witnesses against themselves. The protections of the Fifth Amendment, however, were not limited to criminal defendants. They extended to witnesses who could offer self-incriminating testimony if they chose. The Court in *Rock* may have overlooked this fact when it made the statement quoted in the text.

155. Compare Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) and Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996) with Schulhofer, *Miranda's Practical Effect*, supra note 6; George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

156. See OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986).

157. See Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 954 (1987).

158. Criminal Justice and Public Order Act, 1994, § 35 (Eng.). The Criminal Procedure Act of Norway provides that a criminal defendant need not respond to the charges against him when the state's attorney reads these charges at the outset of his trial. Nevertheless, "[i]f the person charged refuses to answer, or states that he reserves

addition, the Act invites jurors and judges to draw inferences from the pretrial silence of defendants.<sup>159</sup> The Act encourages suspects to cooperate with police investigations, to disclose defenses at the earliest opportunity, and to submit to cross-examination at trial, but its supporters contend that it is consistent with the privilege against self-incrimination because it does not treat a suspect's failure to speak as a crime or as contempt of court.<sup>160</sup>

The European Court of Human Rights will decide whether the 1994 Criminal Justice and Public Order Act violates England's obligation under the European Convention on Human Rights to give every defendant a fair trial. Past decisions make it doubtful that the Act will survive this scrutiny.<sup>161</sup> After centuries of self-congratulation by English judges and lawyers who have denigrated the "inquisitorial" practices of the European continent, continental judges may take ironic pleasure in denouncing England's "inquisitorial" procedure.

Eben Moglen observes, "[T]he history of the privilege reveals how procedure makes substance, and how legal evolution, like natural selection itself, adapts old structures to new functions."<sup>162</sup> More than the adaptation of old doctrines to new functions, however, the history of the privilege against self-incrimination seems to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own.<sup>163</sup> These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embodied these doctrines. The phrases and the images they evoked — what the phrases "sounded like" — shaped the law. Latin maxims declaring that "no one shall be compelled to betray himself" have sounded like the declaration that "no

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his answer, the president of the court may inform him that this may be considered to tell against him." The Criminal Procedure Act of Norway, Ch. 9, § 93 (1991) (unofficial English translation), *quoted in* William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENTARY 55, 61 (1996).

159. See Criminal Justice and Public Order Act, 1994, §§ 34, 36, 37 (Eng.); see generally Ian Dennis, *The Criminal Justice and Public Order Act 1994: The Evidence Provisions*, 1995 CRIM. L. REV. 4; Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994).

160. See Dennis, *supra* note 159, at 10.

161. See *Funke v. Fr.*, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993) (Court report). The 1994 Act was modeled in large part on the Criminal Evidence (Northern Ireland) Order 1988, and the European Commission of Human Rights has concluded that in many applications the Northern Ireland Order violates Article 6.1 of the European Convention. See *Murray v. U.K.*, App. No. 18739/91, 18 Eur. H.R. Rep. CD1 (Comm. Supp. 1994) (Commission report).

162. Moglen, *supra* note 87, at 1090.

163. Some scholars call this process "reification."

one shall be compelled in any criminal case to be a witness against himself." The latter declaration has been summarized as "the privilege against self-incrimination" (a description not generally in use before the twentieth century<sup>164</sup> and one that omits all reference to the constitutional concept of compulsion). The "privilege against self-incrimination," in turn, has sounded like the "right to remain silent." Much of the history of the privilege has been a story of slippage from one doctrine to another without awareness of the change. Officials appear to have drifted from limiting the burdens of the religious obligation to confess in the interest of obtaining more confessions to condemning incriminating interrogation under oath without adequate evidentiary justification. They have drifted from condemning interrogation under oath without evidentiary justification to condemning torture and *all* incriminating interrogation of suspects under oath. The officials then have drifted to a judgment that the framers of all of the earlier doctrines unquestionably would have disapproved — that it is unfair to expect defendants on trial and people arrested on probable cause to participate actively in the criminal process by telling what they know.<sup>165</sup>

Linguistic confusion also may have affected historians of the privilege, and some of the apparent disagreement among them may have arisen from the ambiguity of phrases like "the privilege against self-incrimination." When scholars like John H. Wigmore have concluded that the privilege was in place in common law courts by the end of the seventeenth century, they have meant, mostly, that sworn witnesses in these courts could decline to answer questions on the ground that their answers would incriminate them.<sup>166</sup> When, however, scholars like John Langbein have maintained that the privilege did not come into effective existence until more than a century later, they have meant, mostly, that until the nineteenth century unsworn criminal defendants were expected to answer questions both before trial and at trial.

It might be said that the historians have described two different privileges that arose centuries apart, each of them treated as "the" priv-

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164. See LEVY, *supra* note 52, at xvi ("The familiar phrase of contemporary usage seems to be of twentieth-century vintage.").

165. Cf. Wigmore, *supra* note 32, at 71 ("If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form . . . it is this rule that no man shall be compelled to criminate himself.").

166. The number of cases recognizing this privilege of sworn witnesses may not have been large, but in the absence of any cases after 1700 rejecting the privilege, they are sufficiently numerous to justify the historians' conclusion.

ilege against self-incrimination.<sup>167</sup> Sworn witnesses were privileged not to answer incriminating questions by the end of the seventeenth century, and criminal defendants gained recognition of their right to remain silent approximately 150 years later.

#### IV. WHERE DO WE GO FROM HERE?

The history of the privilege against self-incrimination seems to pose its own "cruel trilemma" for American courts. One possible option for modern courts is to return to the original understanding of the Fifth Amendment with its strong distinction between sworn and unsworn statements. In our era, however, the fires of hell have smoldered. Oaths have lost their terror and even their meaning. Bruce Ackerman, moreover, has pointed to a number of "constitutional moments" that have effectively altered the Constitution without formal amendment.<sup>168</sup> The enactment of statutes ending the testimonial disqualification of defendants was, if not a constitutional moment, at least a constitutional nanosecond. In a very different world from that of the early American republic, restoring the original understanding of the Fifth Amendment privilege is impossible.

If the distinction between sworn and unsworn statements cannot be maintained today, two options remain. One is to treat sworn statements in the same way that eighteenth century English and American courts treated unsworn statements — by strongly encouraging them and by drawing adverse inferences when defendants fail to provide them. England, in effect, chose this option in the Criminal Justice and Public Order Act of 1994, which authorized judges and jurors to draw such adverse inferences in many situations. The second option is to treat unsworn statements in the same way that eighteenth century courts treated sworn statements — with wariness if not complete disapproval. At least on paper, the United States Supreme Court chose this option for defendants in custody in *Miranda v. Arizona*.

If the United States were now to follow England's lead, which seems extremely unlikely, it would treat sworn statements in the same manner that the framers of the Fifth Amendment treated unsworn state-

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167. The historians may have been misled by the assumption that criminal defendants ought to have been the principal beneficiaries of the privilege against self-incrimination. Until the mid-nineteenth century, the principal benefit that defendants derived from the privilege was that they were not expected or permitted to give sworn testimony; accordingly, they could not be punished formally for false answers or for remaining silent. Modern historians have had difficulty seeing the lack of an oath as a significant benefit.

168. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

ments. Just as the framers expected defendants to speak at trial, courts would now expect them to testify. *Griffin v. California* would be overruled along with *Miranda*. The privilege would remain a safeguard against torture and other forms of coercive interrogation, although not against the coercion once thought inherent in the oath. As a concession to the past, courts might permit defendants to testify under oath but exempt their testimony from the penalties for perjury, confirming the de facto exemption that prosecutors usually provide in practice.<sup>169</sup> With the threat of secular penalties removed, the sworn statements of our era might be no more the product of compulsion than the unsworn statements of the founders' era, and treating today's sworn statements like the unsworn statements of the past might be the most accurate "translation" of the Framers' understanding.<sup>170</sup> This position might also be supported by reading the Fifth Amendment at the highest level of generality, by declaring that the word "compelled" invites each generation to determine for itself what interrogation methods are offensive, and by proclaiming that, in the final years of the twentieth century, requiring someone to swear to tell the truth does not seem very much like torture.<sup>171</sup> Still, one might be troubled by an interpretation of the Fifth Amendment that, in one very clear sense, would afford less protection to defendants than the Framers intended them to have.

The last alternative — treating unsworn statements by defendants in the same way that the Framers treated sworn statements — might bar sworn and unsworn statements from evidence altogether. At least it would require suspects to make unfettered waivers of the right to remain silent whenever they responded to official inquiry. It also would forbid fact finders from drawing adverse inferences from the failure of defendants to answer. This solution, the one that *Miranda* adopted for

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169. See VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER 173 (1996) ("[F]or the hundreds of thousands of defendants convicted every year throughout the land for various crimes, it is almost unheard of for there to follow, after their conviction, a prosecution against them for perjury."). This informal exemption may stem less from sympathy for the defendant's self-preservation efforts than from the limited practical utility of a perjury prosecution following a criminal trial. When an apparently perjurious defendant has been convicted at trial, the sentence imposed for her offense is likely to make additional punishment seem unnecessary. Indeed, the sentencing judge might have increased the defendant's sentence because she apparently lied on the stand. See *United States v. Grayson*, 438 U.S. 41 (1978). When a defendant who may have testified falsely is acquitted, moreover, the likelihood of a successful perjury prosecution is ordinarily slim.

170. See Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

171. Virtually all other readings of the Amendment could be supported in the same way.

suspects in police custody, is the worst alternative of all. It is likely to be honored more on paper than in practice, and if taken seriously, it would all but abandon defendants as an evidentiary resource. No sensible criminal justice system would pay this high price; no coherent ethical principle could explain why it should; and the architects of the Constitution never imagined that the Fifth Amendment would be read to demand it.

The history of the privilege against self-incrimination provides only limited guidance in resolving the Fifth Amendment issues that confront modern courts. Recognition that the Amendment does not afford a right to remain silent or require an unfettered waiver of this right whenever officials ask incriminating questions could lead to a reconsideration of *Miranda*, but history cannot tell judges what sorts of interrogation amount to compulsion under the Amendment. As Carol Steiker has observed, "Our twentieth-century police and even our contemporary sense of 'policing' [would be] utterly foreign to our colonial forebears."<sup>172</sup> Nothing closely resembling stationhouse interrogation occurred at the time of the Fifth Amendment's framing.

The nearest analogue to police interrogation known to the Framers was interrogation before a magistrate under the Marian Committal Statute of 1555,<sup>173</sup> and for decades, people whose names "read[] like an honor roll of the legal profession" — Wigmore, Pound, Kauper, Friendly, Schaefer, Frankel, and others — have proposed a return to something like the Marian procedure.<sup>174</sup> Pretrial interrogation before a magistrate of the sort that they envision might require the magistrate to

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172. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830 (1994); cf. Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 197 (Eugene W. Hickock, Jr. ed., 1991) ("Among the things that did not exist at the time the Fourth Amendment became part of the Constitution were cocaine, heroin, helicopters, magnetometers, drug-detecting dogs, professional police forces, and the exclusionary rule.").

173. See *supra* notes 104-08 and accompanying text.

174. The quoted phrase comes from *Lakeside v. Oregon*, 435 U.S. 333, 345 n.5 (1978) (Stevens, J., dissenting), in which Justice Stevens commented in dissent that "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession." See MARVIN E. FRANKEL, *PARTISAN JUSTICE* 98-99 (1980); SCHAEFER, *supra* note 32, at 77-81; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Paul G. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934); Wigmore, *supra* note 32, at 85-88; see also Dripps, *supra* note 32; Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

find probable cause for a suspect's arrest before interrogation could begin. It might permit the suspect to be represented by counsel when her statement is taken. It might bow to the original understanding of the Fifth Amendment privilege by allowing the suspect to remain unsworn. It might permit the magistrate or, perhaps, a prosecutor to question the suspect, taking her statement in much the same manner that a lawyer engaged in civil practice takes a deposition. This procedure might also afford the suspect a reciprocal opportunity to obtain the statements of prosecution witnesses. In 1980 Scotland reinstated its pretrial examination of defendants, and Scotland's experience might guide American reform.<sup>175</sup>

A suspect's answers to orderly questioning in a safeguarded courtroom environment should not be regarded as the product of compulsion. These answers might tend to prove the suspect's guilt because they were incriminating, seemed internally contradictory, rang untrue in certain details, or were inconsistent with the suspect's defense at trial. Equally, the answers might tend to prove the suspect's innocence by showing that she had denied her guilt promptly, in a manner consistent with her trial defense, and in apparently forthcoming answers to specific questions. Interrogation before a judicial officer would be likely to promote accurate fact-finding both when accurate fact-finding would help the suspect and when it would hurt her. If the suspect refused to answer, her refusal should be admissible at trial both because it would have a rational bearing on her guilt and because its admission would

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175. See Criminal Justice (Scotland) Act, 1980, ch. 62, sec. 6(2); Neil Gow, *The Revival of Examinations*, 141 New L.J. 680 (1991) (offering a less sanguine appraisal of Scottish procedure than some Scottish judges and practitioners think justified). In Scotland the examination occurs before a sheriff, the judicial officer who presides at criminal trials in most serious cases. Most of the questioning is by a prosecutor. The accused is not sworn and usually is represented by counsel. He may confer with counsel before answering any question, and counsel may supplement the record by asking clarifying questions of the accused. Questions focus not only on the accuracy of the charges and the availability of defenses but also on the accuracy of any statements that the accused has given to the police and the circumstances in which the statements were made.

The relevant provisions of the Criminal Justice (Scotland) Act caution that "questions should not be designed to challenge the truth of anything said by the accused," that "there should be no reiteration of a question which the accused has refused to answer," that "there should be no leading questions," and that it is the sheriff's responsibility to "ensure that all questions are fairly put to, and understood by, the accused." Criminal Justice (Scotland) Act, 1980, ch. 62, sec. 6(2), § 20A(2)(a)-(c). Although the accused may decline to answer — and some do, typically citing the advice of counsel — the prosecutor and judge may comment at trial on the accused's failure to answer whenever the accused or any defense witness has testified about a matter that the accused might have explained at the examination. See *Alexander v. H.M. Advocate*, 1988 Scottish Crim. Cas. Rep. 542, 1989 Scots L. Times 193.

express the judgment that, following a showing of probable cause, suspects can reasonably be expected to respond to orderly inquiry. For the same reason, a defendant should be expected to speak at trial — perhaps under oath but exempted from the penalties for perjury<sup>176</sup> — and if she declined, the jury or judge should be permitted to draw appropriate inferences.<sup>177</sup>

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176. Permitting defendants to testify under oath but exempting them from the penalties for perjury would resemble the practice of the High Commission in the early seventeenth century, but despite the infamy of the High Commission, the compromise might be appropriate. Jeremy Bentham once observed that courts need not avoid sitting in chambers decorated with stars merely because the court of Star Chamber met in such a chamber. 5 BENTHAM, *supra* note 141, at 241.

The primary reason for retaining the oath despite the absence of a formal sanction for violating it would be to avoid a sharp, unexplained contrast in form between the testimony of defendants and the testimony of other witnesses. Perhaps a defendant should be allowed to present her testimony with the same solemn promise of truthfulness as other witnesses even if she is not threatened with punishment for falsehood.

Justice Walter Schaefer once said of a regime in which defendants were questioned at trial but not under oath, "These rules seem to me to follow natural assumptions. The silence of the accused is noted and taken into account because of the strength of the inference of guilt that flows from his failure to respond; the refusal to administer an oath to the accused, or to force him to answer, reflects spiritual and physical aspects of the law of self-preservation invoked by John Lilburn before the Star Chamber." SCHAEFER, *supra* note 32, at 71.

177. Amidst the disturbing "get tough on crime" laws of the late twentieth century, Congress or a state legislature might actually enact a fair and useful "get tough" measure:

*Section 001. Testimony of the Defendant.*

(A) A defendant may testify under oath in the same manner as any other witness or may decline to testify.

(B) When a defendant testifies, his or her testimony shall not be the subject of a prosecution for perjury and shall not be subject to impeachment by proof of prior criminal convictions.

(C) When a defendant declines to testify, his or her failure to explain incriminating circumstances may be considered by the finder of fact for any rational inference that it yields, and trial participants may comment upon this failure at argument as they could upon other circumstances of the case.

No member of the Supreme Court at the time of *Griffin v. California* is still on the Court, and today's Court might not be notably sympathetic to the *Griffin* ruling. By exempting a defendant's testimony from the threat of a perjury prosecution, however, the suggested statute would provide a substantial basis for distinguishing *Griffin*. The Supreme Court might therefore permit comment on a defendant's silence without overruling *Griffin*. If the suggested statute were enacted, prosecutors would be wise to use the power that it confers sparingly until its constitutionality had been tested.

The proposed exemption of the defendant's testimony from impeachment by proof of prior convictions (afforded by subsection (B) of the statute) would remove a substantial impediment to many defendants' exercise of the right to present a defense — an impediment that in practice deprives fact finders of more information than it gives them. This exemption would not preclude the use of prior convictions as substantive evidence. Cf. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 198 Stat. 1796 § 40141, 108 Stat. 1796, 1918-19 (amending Rule 404(b) of the Federal



The history of the privilege against self-incrimination may raise as many questions for modern courts as it answers, but if a state legislature were to approve a procedure like this one, a court could take much of its guidance from the past. Because this procedure would require a showing of solidly grounded suspicion before interrogation could begin, it would be consistent with the maxim *Nemo tenetur prodere seipsum* as that maxim was understood in the *ius commune* and as it was enforced by the common law courts against the High Commission. The procedure also would be consistent with the original understanding of the Fifth Amendment privilege, for the Framers saw no tension between the privilege and their own interrogation practices — practices that differed from the proposal only in that they lacked some of its safeguards. Finally, the procedure would be consistent with the principles of ordinary morality articulated by Kent Greenawalt. When neither text, history, nor sensible policy condemns a practice, a court should find it constitutional; and if the practice seems inconsistent with the right to remain silent, courts should read the Constitution again. With the help of history and of ordinary morality, they should look at what the Fifth Amendment really says.

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Rules of Evidence to permit proof of prior offenses in sexual assault cases). The propriety of using prior convictions to impeach a defendant's testimony warrants greater consideration than an article on a different subject can provide. I raise the issue only because a legislature could not fairly encourage defendants to testify without reexamining it.